

the issue with Tank Room No. 8 would be dealt with; rather, the Claimant was repeatedly told it would have to build according to plans that were impossible to follow. Undertaking the revised works appeared to be the only option available to the Claimant.

### **Claimant's Actions were Reasonable in the Circumstances**

181. Mitigation is a principle of law found in both common law and civil law systems. On orthodox principles, it is not exactly a “duty”, but rather a statement that damages will be measured based on the actions a reasonable person would take in the claimant’s position. A reasonable person would attempt to prevent the consequences of a breach of contract or other duty from compounding. This is measured within a certain margin of appreciation; it does not require that perfect or flawless mitigation efforts be effected, but merely that they be reasonable.
182. The Claimant cites *Thacket and Grimes, 1987, NCC/122/87* in which Judge Harmond stated, “*the performer of the work has an ongoing duty to mitigate damage wherever it may be found and reasonable compensation for such mitigation must be forthcoming.*”
183. Against this, the Respondent argues, “*there was no damage in the matter of Tank Room 8 and as such there was no duty to mitigate.*”
184. The submission by the Respondent is severely misguided, as it appears to believe the word “damage” concerns only physical damage. Rather, “damage” defined much more broadly to include all legal and material prejudice suffered by a claimant. Delay itself is a considerable head of damage. In the present case, other damage that could have flowed from continuing delays could include:
  - 184.1. lost opportunity costs, including other construction contracts;
  - 184.2. disruption of business plans and disruption to relationships with suppliers, subcontractors, and other contracting parties;
  - 184.3. disruption to employees’ personal lives;
  - 184.4. excess payments on the Advance Payment Guarantee and other financial instruments;
  - 184.5. reputational damage from not completing the Project on time;
  - 184.6. all other manner of direct and consequential loss.
185. Given these and other potential consequences, it is clear that the duty to mitigate loss under *Thacket* applies to the present case.
186. It is clear from the Parties’ submissions that the Claimant’s actions were reasonable.
  - 186.1. The Respondent stated, “*The internal investigation concluded that the unsolicited works done to Tank Room 8 were not desirable but did improve the design to a certain*

degree; certainly not to the extent of the “costs” quoted by the Claimant. We will provide expert evidence to this effect.” However, the Respondent did not provide expert evidence to that effect.

186.2. Jackie Jones stated, “*The works done to Tanks Rooms 5 through 9 were a good solution to the defects in the designs but there may have been cheaper alternatives that satisfied the needs of the Respondent. For example, it may have been viable to remove Tank Room 8 entirely and downsize the project. This may have been a good solution for the Respondent particularly given the funding problem.*” This statement, by the Respondent’s expert witness, shows that the mitigation efforts done by the Claimant were “reasonable” if not “perfect.

186.3. The Engineer acknowledged, “*the Contractor...did works to Tanks Rooms 5 through 9...to solve the design problem in Tank Room 8.*” This acknowledges that they did indeed solve the design problem.

186.4. The Claimant’s expert witness states, “*I can confirm that the works done to Tank Rooms 5 through 9 to compensate for the errors in the Employer’s design of Tank Room 8 were necessary and certainly the cheapest option for making good on the design.*” Although it was improper for the expert to comment on the Employer’s liability, this witness confirms that the works done were reasonable.

187. The Respondent’s characterization that the Claimant “went rogue” and did whatever it wanted at whatever price is simply false. It was forced to confront a situation where the Respondent and the Engineer had apparently frustrated the Contract by means of multiple breaches of contract. It did what was reasonably necessary, and it did it, according to multiple witnesses, at a fair price.

188. I therefore find that the Claimant engaged in reasonable mitigation efforts consequent to the Respondent’s multiple breaches of contract, for which it is entitled to be compensated pursuant to the holding in in *Thackett*.<sup>8</sup>

189. Finally, the Respondent’s reliance on *Angcleric and Booth, 2001, NCA/21/2001* is misguided. The judge in this case stated, “*a contractor cannot simply decide to make changes to the works designed by the employer, the employer must be given opportunity to decide how to handle problems that arise during the process.*” It is clear that the Employer was given ample opportunity to decide how to handle problems over the course of three months; the Respondent chose not to take those opportunities, and indeed made the situation worse by insisting that the Claimant attempt to fulfil impossible plans without discussion.

<sup>8</sup> Additionally, Sub-Clause 13.3 provides, “*The Contractor shall not delay any work whilst awaiting a response.*” In the present circumstances, it is clear that most work had been delayed (or rendered impossible) due to the Respondent’s actions, yet the Claimant remained under a duty to continue working. The Claimant was therefore put in an impossible position, and – admirably – chose to continue to work and fulfil its obligations.

**Alternative Explanations Rejected**

190. There is some insinuation in the Respondent's statements that the Claimant had created an artificial urgency to the need to remedy design defects regarding Tank Room No. 8.
- 190.1. Mr Pryon states, *"We never said that the works to Tank Room 8 were unnecessary but the Claimant did not give us full opportunity to investigate and do a cost analysis, there may have been a better work around for it but they just went ahead and did the work unsolicited."*
- 190.2. The Engineer states, *"but the works were not even nearly to that stage at the time"* and *"we were not at the stage of building Tank Room 8 yet anyway. The Contractor though made some changes to the work schedule to deal with the Tank rooms earlier than scheduled and did works to Tanks Rooms 5 through 9 over the last two weeks in October, to solve the design problem in Tank room 8."*
191. The insinuation apparent to me is that the Claimant was somehow aware of the Respondent's loss of financial support, and rushed to undertake mitigation works that expanded the scope of the Project before the consequences of that manifested, enabling the Claimant to secure financial benefits before any questions as to solvency arose.
- 191.1. It is true that Mr Tarens stated, *"Of course, it turns out that their inability to pay had nothing to do with our "unsolicited" work or anything to do with us, but rather that their funders cut the funding for the project. I mean we knew of course but the funders were nothing to do with us, that's Pyro's business not mine, we never mentioned it."* This statement does not indicate when exactly he discovered that the Respondent had lost its funding. It appears to indicate discovery of this fact after the mitigation works on Tank Room No. 8 had been undertaken, and appears to convey a rejection of this as an excuse. On its face this does not constitute an admission that he had taken advantage of the Respondent's financial difficulties.
- 191.2. More straightforward evidence comes from Mary Bell, secretary to Mr Tarens, who indicates that she learnt of the loss of funding at a Christmas party, which puts her discovery of this fact approximately seven weeks after the Claimant undertook the mitigation works. Imputation of knowledge in either direction between Mr Tarens and his secretary is best avoided as speculation, but an inference can be made that it is at least possible that neither knew about this development until the Christmas party.
192. On balance of probabilities, this insinuation, and its effects on the mitigation analysis above, should be rejected. A responsible contractor would be more interested in ensuring the long-term viability of the project, rather than securing a short-term financial gain that further imperiled the financial status of its employer; after all, a long-term strategy would ensure greater financial returns.
193. Finally, there has been insinuation from the representatives of the Claimant that the principal motive of the Respondent in opposing payment for the mitigation works was their own knowledge of their precarious financial state. This may well be true, but is irrelevant to

the present analysis; no element of good faith in the contract law of Northistan has been adduced to me, and the Respondent remains free to base its legal theories on the rights it asserts.<sup>9</sup>

### **Summary: Respondent's Liability for Mitigation Costs**

194. To summarize, it is not on the basis of the variation procedures in Sub-Clause 13.2 that the Claimant bases its claim for compensation for the works it did to remedy design defects regarding Tank Room No. 8, but rather in the principles of mitigation as expressed in the general law and in the decision in *Thackett*. The Claimant's mitigation efforts were consequent to the Respondent's multiple breaches of contract. On all evidence adduced, by both parties, these efforts should be considered reasonable. The Claimant does not appear to have undertaken these mitigation efforts in order to exploit the Respondent's financial weakness for short-term gain.

195. Pursuant to the decision in *Thackett*, the Claimant is entitled to just compensation for its mitigation efforts.

### **Quantum**

196. There is little disagreement as to the value of the works done by the Claimant.

196.1. In its Particulars of Claim the Claimant sought only material costs, not workmanship, and therefore seeks N\$1,000,000.

196.2. Mary Bell costed the work at N\$1,232,532.21, which included N\$225,000 for workmanship. This leaves N\$1,007,532.21 for materials, which is greater than what is claimed. Ms Bell is not an expert.

196.3. Evan Llywd, an expert in delay damages and commercial financing, conducted forensic analysis and confirmed that the figures produced by Ms Bell are correct.

196.4. Jackie Jones, expert witness for the Respondent, states that the works done were "a good solution" but there "may have been cheaper alternatives..." Ms Jones therefore does not dispute the accuracy of the figures.

196.5. Although the Respondent declared in its Defence that it did not believe that Tank Room No. 8 was improved to the level of costs claimed by the Claimant, and stated that it would provide expert evidence to this effect. However, Ms Jones did not accomplish this for the Respondent. In written submissions, did not address this directly, stating, "*Whilst it may be true that the Contractor's new designs would have been correct and allowed the full functionality, the actual building work achieved with this N\$1,000,000 did not include the mezzanine or stairways or any of the machinery housing etc let alone the machinery itself.*" It remains ambiguous as to the degree to which the Respondent

<sup>9</sup> For a dramatic illustration of this principle, the reader is directed to *Ruxley Electronics and Construction Ltd v Forsyth* [1995] UKHL 8.

accepts the figures put forward; this most recent statement appears to acknowledge that N\$1,000,000 of work had been done.

196.6. During the Hearing, I noted the amount in question was actually higher than the N\$1,000,000 claimed. The Claimant stated it did not wish to amend its claim. Despite an outburst by Mr Tarens regarding interest, I interpreted the Claimant's statement that it would not amend its claim to seek a higher amount as a sign of good faith by the Claimant.

197. As there is no substantial disagreement as to the amount claimed by the Claimant in regards to its mitigation works, and as there is considerable evidence put forward by Mary Bell (under the business records exception to the hearsay rule) and confirmed by expert Evan Llywd, I accept the sum of N\$1,000,000 as representing the cost of materials expended by the Claimant in undertaking mitigation works.

198. N\$1,000,000 therefore constitutes just compensation for the Claimant's mitigation efforts.

### **THE AWARD**

199. For all of the reasons given above, I make the following findings of fact and law.

#### **Summary of Preliminary determination regarding jurisdiction in relation to Notice of Arbitration**

200. I find that I have jurisdiction to see this matter. I find that a typographical error or confusion as to the spelling of the name of a party does not invalidate a Notice of Arbitration. There are cost implications to be taken into account for this matter.

#### **Summary of Preliminary determination regarding jurisdiction in relation to arbitration clause**

201. I find that I have jurisdiction to see this matter. I find that the Arbitration Clause as agreed between the Parties does not impose the constitution of a Dispute Board as a condition precedent to the filing of a Notice of Arbitration. There are cost implications to be taken into account for this matter.

#### **Summary of Evidential determination**

202. I find the document discovered by the Claimant, who attempted to introduce it into evidence, to be inadmissible as a privileged document as a confidential document between the Respondent and its counsel. There are cost implications to be taken into account for this matter.

#### **Summary of the Substantial Issue concerning non-payment of IPCs and Advanced Payment**

203. I find that IPCs 5-8 are properly certified and remain payable. I find that the Advance Payment may not be used to cover outstanding sums due on IPCs 5-8, as the Advance Payment has been consumed by activities attributable to the Contract.
204. As such, the Claimant is granted a declaration to the effect that IPCs 5-8 were duly certified and are payable, the Respondent is ordered to pay the Claimant the principal sum of:
- 204.1. **E£3,000,000 for the unpaid IPCs**
205. Interest shall run on each IPC from the date it became payable, and shall be calculated in the ‘restitutionary’ manner described below.

#### **Summary of the Substantial Issue concerning mitigation works done on Tank Room No. 8**

206. I find that the mitigation works done on Tank Room No. 8 fall outside the provisions concerning variations contained within Clause 13. I find that the Respondent breached multiple obligations under the Contract, requiring the Claimant to mitigate its losses. I find the manner in which the Claimant mitigated its loss, by undertaking works to remedy design flaws produced by the Respondent, to have been reasonable. I find that there is no dispute as to the value of those works.
207. As such, the Claimant is granted an award of:
- 207.1. **E£1,500,000 for the costs of the changes made to Tank Room 8**
208. Interest shall run on this claim from 1 November 2020, and shall be calculated in the ‘restitutionary’ manner described below.

#### **Summary of Interest**

209. I find that I have the authority to award interest based on general compensatory and restitutionary principles. The UNCITRAL Model Law and the UNCITRAL Rules are silent as to my authority, and I have not been presented with the law relating to the award of interest of the seat of arbitration, Easthead.
210. A distinction<sup>10</sup> must be made between primary liabilities that principally take the form of a debt, and secondary liabilities that principally take the form of damages. A compensatory award looks to what a claimant has lost, whereas a restitutionary award looks to the benefit that has accrued to the respondent. It is for this reason that simple interest is awarded for compensatory awards, as damages reflect a claimant’s loss. On the other hand, compound interest is awarded as it represents what use a respondent could make with the benefit in his hands.

<sup>10</sup> The following analysis employs arguments made in *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34. The ruling of the Supreme Court in *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2018] UKSC 39 concerns statutory interpretation and does not affect the conceptual analysis.

211. I categorize the awards to the Claimant as follows:

211.1. Non-payment of IPCs concerns outstanding debts, and thus a restitutionary award is appropriate.

211.2. Works undertaken in mitigation of loss, in the hands of the Respondent, are a proprietary benefit, and thus a restitutionary award is appropriate.

211.3. Costs merely compensate the Claimant for expenditure in this arbitration, and thus a compensatory award is appropriate.

212. It is far beyond the scope of this arbitration to make provisions for an additional award for interest, let alone based on the “subjective devaluation” the Respondent might ascribe to the benefit in his hands. Indeed, the categorization of the Claimant’s claims as compensatory or restitutionary might already be considered generous to the Claimant. To that end, I have adopted the Sterling Overnight Index Average (SONIA), a risk-free rate (i.e., generous to the Respondent) that is compounded daily, which has replaced LIBOR, for the following restitutionary awards.

213. In undertaking these calculations, I have made use of the calculator found on this website: <https://www.realisedrate.com/SONIA>

214. I award the following restitutionary interest awards, based on an award date of 13 June 2022:

Claim	Date	Original value (N\$)	Award (N\$)	Award (E£)
IPC 5	28 January 2021	500,000	1,485.16	2227.74
IPC 6	28 February 2021	500,000	1,465.79	2198.685
IPC 7	28 March 2021	500,000	1,445.03	2167.545
IPC 8	28 April 2021	500,000	1,424.99	2137.485
Mitigation works	1 November 2020	1,000,000	3,093.04	4639.56
Total				13,371.015

215. I award the following for compensatory interest awards, as determined in the “Costs” section below. I have taken the average Bank of England interest rate as the basis for a calculation of simple interest, where 2021 had an average rate of 0.1%, and 2022 had an average rate of 0.2%.

Claim	Date	Original value (E£)	Interest rate	Award (E£)
Claimant's costs	13 June 2022 (0 days)	350,000	0.2	0
Claimant's fees	15 July 2021 (333 days)	29,000	0.15	39.69
Claimant's fees	14 February 2022 (119 days)	29,000	0.2	18.91
Total				58.6

216. Thus, on the date of the Award, I award the Claimant 13,429.615 in interest.
217. I order that the unsuccessful party is to be given a grace period of 14 days from the date of this award to make payment to the successful party, during which time no interest shall run.
218. In regards to post-award interest, on standard principles, I have discretion to award a higher interest rate to deter non-compliance.
219. Should the unsuccessful party fail to make payment within this 14-day period, interest will run from the 15<sup>th</sup> day at a rate of 2\*SONIA rate calculated daily for restitutionary interest awards and 8% simple interest rate calculated daily compensatory awards, for non-compliance with the award. I consider this rate to be appropriate and proportionate.

### **Summary of Costs**

220. I find that I have the authority to award costs pursuant to Article 40 et seq of the UNCITRAL Rules, the Parties' requests, and their agreement in the Preliminary Meeting. This authority is subject to the Parties' agreement, made at the Preliminary Meeting, that costs be capped at E£500,000 per party total.
221. Article 42 of the UNCITRAL Rules provides,
- 1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.*
- 2. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.*

222. I have been presented with evidence of three settlement offers prior to the filing of the Notice of Arbitration.
- 222.1. On 7 June 2021, the Claimant made a first offer of N\$3,000,000 in outstanding payments and the return of the letter of credit. The Respondent refused to pay this amount, and though it did not cash the letter of credit, it threatened to do so.
- 222.2. On 15 June 2021, the Respondent made an offer of N\$1,000,000 and offered to return the letter of credit. The Claimant summarily refused this offer on 16 June 2021.
- 222.3. On 20 June 2021, the Respondent made an offer of N\$1,500,000. The Claimant refused this offer on 1 July 2021, shortly before issuing the Notice of Arbitration.
223. I have been presented with evidence concerning the payment of the costs of the arbitration. The Respondent has refused to pay any fees during the process, and the Claimant has paid the entirety of the costs, including a total of E£29,000 on behalf of the Respondent, after I said I would withhold the Award until payment of the outstanding costs and fees was made.
- 223.1. The Claimant has paid E£18,000, the entire cost of the arbitration.
- 223.2. The Claimant has paid E£40,000, my arbitrator's fees.
224. The Parties have submitted cost sheets in regards to the arbitration:
- 224.1. The Claimant has claimed E£350,000.
- 224.2. The Respondent has claimed E£1,200,000, which it has claimed to be reasonable despite the agreed cap.
225. I note the following actions undertaken by the Claimant that have negatively affected proceedings:
- 225.1. The Claimant sought to introduce documentary evidence of a privileged nature. This required me to have the Parties submit short written briefs on the matter and address the admissibility over the period of one hour on 13 January 2022.
- 225.2. Mr Tarens, Managing Director for the Claimant, verbally interrupted proceedings to make a joke in regards to the accumulation of interest on the mitigation works.
226. I note the following actions undertaken by the Respondent that have negatively affected proceedings:
- 226.1. The Respondent sent an email to me, the EAI, and the Claimant on 15 July 2021, denying that I had been properly appointed and denying that the tribunal had been properly constituted, in violation of UNCITRAL Rules Article 3(5).

- 226.2. The Respondent brought a jurisdictional challenge in regards to a typographical error in its name in the Notice of Arbitration. Most concerns about the identification of parties involve members of corporate groups and new corporate entities following mergers and acquisitions. This jurisdictional challenge bordered on frivolous.
- 226.3. The Respondent brought a jurisdictional challenge in regards to the interpretation of the Arbitration Clause. The Arbitration Clause quite obviously did not impose the constitution of a Dispute Board as a condition precedent to the bringing of arbitral proceedings. This jurisdictional challenge bordered on frivolous.
- 226.4. The Respondent violated its agreement with the Claimant, and Order for Directions No. 1, by violating the cap on costs agreed at the Preliminary Meeting.
- 226.5. The Respondent has claimed excessive fees, nearly four times greater than those claimed by the Claimant, without explanation. The Respondent asserted in its Defence, without basis, a right to claim those fees in violation of the agreed cap.
- 226.6. The Respondent has failed to make any payments in respect of the fees of the arbitration or my fees as arbitrator.
227. I note that the Respondent has not properly pleaded it should be awarded costs, as its statement in its Defence as regards costs was not within its Prayer for Relief.
228. On balance, the Respondent's behaviour during proceedings has been considerably more disruptive than the Claimant's behavior.
229. Given that the Claimant has been overwhelmingly successful in this arbitration and I see no other indication against a full cost order, I find that the Respondent is liable for both its own fee and the whole of the Claimant's party costs.
230. The Claimant submitted a cost sheet indicating its legal fees to be £350,000 and the Respondent has submitted a cost sheet indicating its legal fees to be £1,200,000. Given that I find the Respondent liable for the Claimant's fees and the Respondent's fees are far in excess of the Claimant's, I see no reason to go into a discussion of the proportionality of these fees.
231. The Respondent engaged in settlement negotiations; however, the Respondent's offers were far below what was ultimately ordered. I also note that it was the Claimant who made the first offer, and that offer closely resembles the sums ultimately awarded to the Claimant. Had the Respondent simply accepted the Claimant's offer, arbitration could have been avoided, as the outcome would have been essentially the same. If blame for the institution of proceedings is to be assigned, it lies with the Respondent.
232. The costs to be borne in this arbitration are as follows:
- 232.1. The Claimant's request for its legal fees of £350,000 is **granted**.
- 232.2. The Respondent's request for its legal fees of £1,200,000 is **denied**.

232.3. The Claimant's payment of E£58,000 for the fees of the arbitration and my fees as arbitrator are to be **reimbursed in full** by the Respondent.

233. As such, the Respondent is ordered to pay the Claimant the sum of E£408,000 in costs, being its legal fees plus Claimant's reimbursement.

## **DISPOSAL**

234. For all of the reasons herein contained:

235. I declare that:

235.1. **IPCs 5-8 remain payable, and cannot be covered by the Advance Payment, which has been consumed to the benefit of the Respondent.**

235.2. **The Claimant rightfully undertook works on Tank Room No. 8 in mitigation of losses caused by the Respondent's multiple breaches.**

236. I order that the Respondent shall pay the Claimant the sums of:

236.1. **E£3,000,000** for unpaid IPCs 5-8

236.2. **E£1,500,000** for works to Tank Room No. 8

236.3. **E£13,371.015** in pre-award interest in respect of Unpaid IPCs and Tank Room No. 8

236.4. **E£58.60** in pre-award interest in respect of costs

236.5. **E£350,000** in costs for the Claimant's legal fees

236.6. **E£58,000** in costs for the fees of the arbitration and the fees of the arbitrator

236.7. **Therefore, a total of E£4,921,429.62 is payable by the Respondent to the Claimant**

237. I award a grace period for the Respondent to pay the above sums of 14 days from the date of this award, being 14 June 2022, during which period no interest shall run.

238. However, should the Respondent fail to settle this Award by 5 PM Central Easthead time 28 June 2022, I order that **non-compliance interest** will run up to the date of payment at a rate of:

238.1. 2 \* SONIA rate compound interest calculated daily:

238.1.1. On the unpaid IPC amount of **E£3,000,000**

- 238.1.2. On the Tank Room No. 8 works amount of **E£1,500,000**
- 238.1.3. **Therefore, non-compliance interest, calculated as 2 \* SONIA rate, calculated daily, will run on the principal amount of E£4,500,000, in the event of non-payment by 5 PM on 28 June 2022.**
- 238.2. 8% simple interest calculated daily:
- 238.2.1. On Claimant's legal costs of **E£350,000**
- 238.2.2. On costs for fees of the arbitration and fees of the arbitrator of **E£58,000**
- 238.2.3. **Therefore, non-compliance interest, calculated based on simple interest of 8%, calculated daily, will run on the principal amount of E£408,000, in the event of non-payment by 5 PM on 28 June 2022.**

#### **THE EXECUTIVE SUMMARY**

239. In summary, the Respondent is ordered to pay the Claimant the sum of **E£4,921,429.62** on or before 5 PM Central Easthead Time on 28 June 2022.
240. If the Claimant fails to make this payment on time, it is ordered to pay the Award amount of **E£4,921,429.62 plus 2 \* SONIA rate on the principal amount of E£4,500,000 calculated daily, plus 8% simple interest calculated daily, to the date of payment.**

By my hand, this Award, made this day of 14 June 2022 in the seat of arbitration, Easthead,



Dr Dara Ngambi,  
Arbitrator.

### **AUTHORITIES**

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CI Arb – Workbook – Module 2 – Law of Obligations

CI Arb – Workbook – Module 3 – Evidence, Decision-Making & Award Writing

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*Grantham and Forbes, 1824, ESC1/22/24*

*Kierste and Bekir, 2014, NCA/99/2014*

*Thacket and Grimes, 1987, NCC/122/87*

UNCITRAL Arbitration Rules, 2013, as amended

UNCITRAL Model Law 1985, with amendments adopted in 2006.

IBA Rules of Evidence

2017 FIDIC Silver Book

## **NOTES TO EXAMINER**

### **Variation Procedure**

Clause 13.3 appears to contain an error: “*Upon instructing or approving a variation, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree...*”

I assume that this should be “Sub-Clause 4.4 [Determinations]”.

### **Law governing the arbitration agreement**

This is easily the most infuriating element of this exam, as the Exam Papers have not spelt out the law governing the arbitration agreement, merely the seat. They have alluded to the UNCITRAL Law and UNCITRAL Rules, but have not explained how they are incorporated into domestic law. This contrasts heavily with the tutorial paper and the old exam paper.

I have no idea what the significance of the statement, “*Easthead and Westland enjoy a very close statutory relationship,*” is.

I have made an argument that the law of Easthead applies to the arbitration agreement and thus the proceedings based on the seat of the arbitration. However, I have not been presented with the **name of arbitration statute of Easthead**. This makes it difficult even to write the header, and following convention, I have simply rendered it as an “ad hoc” arbitration.

Part of my motivation for making this conclusion is admittedly an understanding that this exam does not simply seek to test my knowledge of jurisdiction and seat theory.

### **Expert Testimony Agreement and Order for Directions No. 1**

The Stage 1 Paper included a list of matters agreed to by the Parties. It is only in the Defendant’s Defence and Counterclaim at [3] that it asserted a right to put forward expert testimony.

The Stage 2 Paper states, “*The Parties agreed during the Preliminary meeting that they would each appoint an expert.*” This simply is not established on the record of Stage 1.

Article 19(1) of the Model Law provides, “*Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.*”

No objection has been made by either party as to the introduction of expert evidence by its counterpart, and it can safely be assumed that an agreement has been reached as to the introduction of expert testimony. However, when this agreement occurred is ambiguous on the record. I have stated in the Award that this issue was dealt with at the Preliminary Meeting.

Furthermore, it should be noted that no copy of Order for Directions No. 1 has been provided. Stage 1 states, “*I issued Order for Directions No. 1 the same day reflecting the above matters and also ordering costs in the arbitration as per the agreement of the parties.*”

Inferring from the discussion as to expert testimony, I have inferred that Order for Directions No. 1 included an agreement to allow the parties to adduce expert testimony.

It is my sincere hope that I am not penalized for making these inferences, as an ambiguity was created by the exam papers.

Should it not be the case that this agreement was not made at the Preliminary Hearing but at some later stage, the Award would be modified *mutatis mutandis* to reflect when the agreement and relevant procedural order were made.

### **Appointing Authority**

The UNCITRAL Rules provide for the authority of appointing authorities to appoint arbitrator(s) in cases heard under the UNCITRAL Rules. Article 6(1) of the UNCITRAL Rules provides, “*Unless the parties have already agreed on the choice of an appointing authority...*” This statement allowed parties to agree to an appointing authority.

The UNCITRAL Rules provide at Article 8(1), “*If the parties have agreed that a sole arbitrator is to be appointed and if within 30 days after receipt by all other parties of a proposal for the appointment of a sole arbitrator the parties have not reached agreement thereon, a sole arbitrator shall, at the request of a party, be appointed by the appointing authority.*”

The present case appears to fall within Article 8(1). The Arbitration Clause states, “*A sole arbitrator will be appointed by the Easthead Arbitration Institute, (EAI), in its capacity as appointing authority.*” This uses (apparently) mandatory language – “*will*” – but qualifies that with “*in its capacity as appointing authority.*” The Parties had already agreed that a sole arbitrator was to be appointed by virtue of the other parts of the Arbitration Clause. Arguably, then, Article 8(1) applies.

If it does, the Claimant and the EAI have not complied with it, and arguably the Tribunal lacks jurisdiction.

However, against this must be said: (1) The Respondent has not raised this as a challenge to jurisdiction, which constitutes waiver under Article 4 of the UNCITRAL Model Law; and (2) If jurisdiction fails on this basis, it only fails temporarily; the Claimant will then seek to comply with the requirements of Article 8(1), prompting the EAI to comply with the requirements of Article 8(1). The result will simply be a procedural delay of one month. In the interests of economy, an arbitrator would arguably be justified in asserting her jurisdiction despite this apparent, unargued concern.

Further, pursuant to the arbitrator's *Kompetenz-Kompetenz*, the arrogation by the EAI unto itself of its power to correct its records is of no concern. It is for the arbitrator to determine the validity of her appointment by the appointing authority, not for the appointment authority to undermine it with administrative procedures.

### **New Evidence**

In Stage 2, page 4, the Exam Paper states “*because the document was obtained without the permission of the Claimant. The Respondent countered this by saying that the Claimant gave them this flash drive and did not supervise them or give nay instruction as to its use. Furthermore, any allegation of criminality is outside the remit of the arbitrator.*” I must assume that these sentences misidentify the Parties, as the rest of this section states that it is the Claimant who discovered the document.

HORIZONS&amp;CO

الآفاق ومشاركوه

**To:** China State Construction Engineering Corporation ME LLC  
E-mail: [antonina\\_slukina@chinaconstruction.ae](mailto:antonina_slukina@chinaconstruction.ae)

**FROM:** Horizons & Co Law Firm

**DATE:** 7 October 2021

**SUBJECT:** Legal Opinion: Non-Payment of Interim Payment Certificates.

### Introduction

1. We refer to the Contract between China State Construction Engineering Corporation ME LLC and Ajman Holding LLC. Unless otherwise defined in this letter, terms and expressions defined in the Contract have the same meanings when used in this letter.
2. Items of particular note are **highlighted in bold**.
3. This letter is provided pursuant to the engagement between China State and Horizons & Co.
4. The provision of this opinion is not to be taken as implying that we owe a duty of care to anyone other than our client, in relation to the content of, and the commercial and financial implications of, the Contract Document, Mirkaaz Mall, Ajman, UAE, Main Works Package, dated 8 January 2018 (the "**Contract**"). This advice is provided solely for the benefit of the Client and for no other person or entity.
5. This letter sets out our opinion on certain matters of UAE law and contractual interpretation as currently applied by the courts of the UAE. We express no opinion on the law of any other jurisdiction. We have not made any investigation of, and do not express any opinion on, any other law.
6. For the purposes of this letter, we have examined:

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- a. The Contract signed between Ajman Holding LLC (“the Employer”) and China State Construction Engineering Corporation LLC (“China State”, “the Contractor”) on 8 January 2018.
- b. Correspondence provided by China State on 29 September 2021 between China State, Ajman Holding LLC, and Funtastic Engineering Consultancy LLC, between February 2021 and September 2021.

### Executive Summary

7. The Contractor arguably has a strong case in regards to the unpaid IPCs, as these have been acknowledged by the Employer as owing; these IPCs have been certified by the Engineer; and they have not in fact been paid. Furthermore, there does not appear to be a dispute as to this debt owed by the Employer.
8. The Contractor also arguably has a strong case in regards to financing charges. Financing charges appear to arise as a primary liability by way of contractual machinery, but out of an abundance of caution, the Contractor should also provide notice to the Engineer of these charges.
9. The Contractor appears to have effected a reduction in the rate of progress in the Works, factually since 22 April 2021 and effective under the Contract as of 10 May 2021. The Contractor appears to be exposed to liability for its reduction during the 18-day period between these two dates, when it was arguably non-compliant with the Contract for having reduced its rate of progress improperly.
10. The Contractor appears to have effected suspension of works on either 19 September 2021 or 26 September 2021. The Contractor factually suspended works on 1 September 2021. The Contractor appears to be exposed to liability for its suspension of works for either the 18-day or 25-day period between these dates, when it was arguably non-compliant with the Contract for having suspended work improperly.
11. Because of these periods of noncompliance, the Contractor faces exposure for giving inadequate notice under the Contract.
12. The email sent by Li Donghai on 17 August 2021 mentions, “Agreed by Ajman Holding, CSCEC replaced its performance bond with security cheque”. Horizons & Co. do not have any further

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information regarding this matter, and if it is of concern to the Client, we encourage the client to provide further instructions.

13. The Contractor appears to have a good claim to bring before an arbitral tribunal. The Contractor must follow the contractually mandated procedure in bringing its claim before a tribunal. It is required (1) to send a Notice of Dispute to the Employer; and (2) to attempt amicable settlement with the Employer for a period of 14 days; and (3) only thereafter may it bring a claim. It is likely that the DIFC-LCIA Rules will apply to this arbitration, as prescribed by the contract. However, the government of Dubai has recently enacted Decree No. 34 of 2021, which may impose DIAC Rules on this arbitration in the future. The Contractor must be sensitive to time, that if it wishes to bring a claim under DIFC-LCIA Rules, it must do so before the new DIAC Rules are promulgated; this Opinion expresses no opinion as to which set of rules would be preferable, as the new DIAC Rules have not yet been promulgated or thus evaluated.
14. The Employer is arguably in breach of its obligations under Clause 2.4 (reasonable evidence regarding financing) and Clause 14.7 (payment of IPCs). The Contractor is arguably entitled to terminate its Contract with the Employer pursuant to Clause 16.2 of its Contract with the Employer in light of these breaches. The Contractor is also entitled to terminate its Contract under general principles of UAE law. The Contractor must give 14 days' notice to the Employer if it intends to terminate the Contract.

### Opinion – Issue 1 – Reduction in Performance

#### Clause 16.1 – Contractor's Entitlement to Suspend Work

If the Engineer fails to certify in accordance with Sub-Clause 14.6 [*Issue of Interim Payment Certificates*] or the Employer fails to comply with Sub-Clause 2.4 [*Employer's Financial Arrangements*] or Sub-Clause 14.7 [*Payment*], **the Contractor may, after giving not less than 21 days' notice to the Employer, suspend work (or reduce the rate of work) unless and until the Contractor has received the Payment Certificate, reasonable evidence or payment, as the case may be and as described in the notice.**



The Contractor's action shall not prejudice his entitlements to financing charges under Sub-Clause 14.8 [Delayed Payment] and to termination under Sub-Clause 16.2 [*Termination by Contractor*].

If the Contractor subsequently receives such Payment Certificate, evidence or payment (as described in the relevant Sub-Clause and in the above notice) before giving a notice of termination, the Contractor shall resume normal working as soon as is reasonably practicable.

If the Contractor suffers delay and/or incurs Cost as a result of suspending work (or reducing the rate of work) in accordance with this Sub-Clause, the Contractor shall give notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [*Contractor's Claims*] to:

- (a) an extension of time for any such delay, if completion is or will be delayed. under Sub-Clause 8.4 [*Extension of Time for Completion*]; and
- (b) payment of any such Cost, plus reasonable profit, which shall be included in the Contract Price.

After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine these matters.

15. The FIDIC contractual provisions cited above, a 21-day notice period is required before the Contractor can reduce its rate of work, unless it has received the Payment Certificate, reasonable evidence, or payment.
16. Although the Contract gives rise to an entitlement to reduce the rate of works and/or to suspend works, the present case evinces ambiguity as to whether reduction of rate of performance was properly effected. In particular, it is ambiguous and possibly unlikely that the Contractor gave the Employer proper notice as to its intention to reduce its rate of performance.
  - a. The Contractor's email on 28 March 2021 reminded the Employer of its obligations under IPC #36, but did not announce the Contractor's intention to reduce the rate of performance.



- b. The Contractor's letter to the Employer on 4 April 2021 stated that the payment was overdue, and that the Contractor would not be responsible for delay due to this pursuant to Clauses 8.4 (EOT) and 16.1 (quoted above). However, although no formality requirement is present in the Contract, this letter did not carry the appearance or announcement of a notice, and was ambiguous in its intended effect. Disclaiming responsibility is readily distinguished from evincing an intention to reduce the rate of progress on works.
- c. The Employer's email to the Contractor on 5 April 2021 appears to interpret the 4 April 2021 letter to the Employer as notice pursuant to Clause 16.1, stating that the non-payment of IPC #36 four days earlier had not met the contractual requirement of 21 days. It must be noted that this point was not, in the documents provided to Horizons & Co., specifically addressed by the Contractor in subsequent correspondence.
- d. The Contractor's email to Horizons & Co. dated 4 October 2021 indicates the Contractor was and is under the belief that it had effect a reduction of the rate of progress on 22 April 2021, i.e., 21 days from 1 April, the date that IPC #36 had not been paid. Although the Employer, in its email on 5 April 2021, appears to acknowledge that a reduction would have been permissible at the date of 22 April 2021, it does not appear that notice itself was effected on 1 April.
- e. The Contractor's letter to the Employer on 19 April 2021 indicates an intention to reduce the rate of work from 22 April 2021. This letter therefore did not effect notice of 21 days effective 22 April 2021. However, the language of this letter states that it was "*hereby notifying*" that the rate of works would be reduced from 22 April 2021. 21 days from 19 April 2021 was 10 May 2021. **By notifying on 19 April 2021, and factually reducing works from 22 April 2021, it is arguable that the Contractor was in breach of contract for 18 days, and that the Contractor legitimately has reduced works from 10 May 2021 onwards.**
- f. The Contractor's letter dated 29 April 2021 contains language from which an inference of a reduction can readily be made. The Employer was at this point arguably on notice that the reduction had taken place. In its letter dated 1 June 2021, the Contractor used



language indicating the existence of a reduction ("*albeit at a reduced rate*"). Similarly, in its letter to the Employer dated 5 August 2021, the Contractor used language indicating the existence of a reduction ("*may continue the work at a reduced rate of works...*").

17. It is therefore arguable that the Contractor has factually reduced works since 22 April 2021, was in breach of contract from 22 April 2021 to 9 May 2021, and has reduced works in a manner sanctioned by the Contract since 10 May 2021. **This creates exposure for the Contractor for this period of breach.**

### Opinion – Issue 2 – Alternative Payment Arrangements

#### Clause 2.4 – Employer's Financial Arrangements

The Employer shall submit, within 28 days after receiving any request from the Contractor, reasonable evidence that financial arrangements have been made and are being maintained which will enable the Employer to pay the Contract Price (as estimated at that time) in accordance with Clause 14 [Contract Price and Payment]. If the Employer intends to make any material change to his financial arrangements, the Employer shall give notice to the Contractor with detailed particulars.

18. Pursuant to Clause 2.4 of the Contract, the Employer had a duty to provide the Contractor reasonable evidence of its financial arrangements. The purpose of this clause is to ensure that the Contractor would be able to arrange its own financial affairs with a reasonable assurance as to future payments to be received from the Employer.
19. On 5 April 2021, the Employer indicated that "*payment of IPC 36 is under process and to be released shortly,*" which indicates at most a then-current intention to release payment to the Contractor.
20. On 27 May 2021, the Contractor requested from the Employer reasonable evidence of a financial arrangement, pursuant to Sub-Clause 2.4 of the General Conditions of the Contract.



21. On 13 June 2021, the Employer wrote an email to the Contractor stating that, *“our tentative payment plan is... payment to bill no 36, 37, & 38 will be settled by the end of June”*. It also stated that its discussions with its bank *“whilst very well advanced and positive, will only be finalized this coming week pending a final executive management meeting and we will keep you posted if there is any changes in the above mentioned plan.”*
22. The Contractor wrote to the Employer on 23 June 2021 repeating the sentence (without context) *“Payment to bill no 36, 37, & 38 will be settled by the end of June.”* Then the Contractor stated that based on this promise, the Contractor had committed to the plans of its subcontractors and suppliers.
23. Finally, on 17 August 2021, the Contractor wrote to the Employer, mentioning a meeting that took place on 4 July 2021 and memorializing the discussion that took place at the meeting held on 11 August 2021. At this meeting, the Parties discussed new negotiations regarding project finance with CBD, a bank; discussions with “His Highness” regarding funding; the release of a payment of between AED 3 and 5 million; and supply chain disruptions due to lack of payment
24. Analysis of this can go two ways:
- First, it is clear that the Employer was under a duty under Clause 2.4 to provide the Contractor assurances of its financial health by way of reasonable evidence. No evidence has been provided that the Employer performed that duty. Furthermore, the Employer repeatedly assured the Contractor of its ability and willingness to pay monies owed, and indeed apparently induced the Contractor to rely on these assurances. This indicates that the assurances provided to the Contractor were at least to some extent convincing, whether or not they were reasonable. **In either interpretation, the Employer breached its duty under Clause 2.4: either it simply failed to provide reasonable evidence, or it provided evidence that was not reasonable.**
  - Second, it is conceivable that the assurances made by the Employer supplemented the provisions of the Contract, or created a separate contract. In this regard, it must first be noted that such an agreement would still be covered by the arbitration clause under Clause 20.2 (*“arising out of or in connection with”*). Furthermore, it must be noted that the parameters of such an agreement are poorly defined on the record as provided to



Horizons & Co. The Employer's letter dated 5 April 2021 indicates nothing more than a present intention, not an intention to form a new agreement. In particular, the precatory and outright aspirational language used by the Employer in its 13 June 2021 email must be noted. The record, such as it is, of the 11 August 2021 meeting again indicates aspiration, rather than any conclusive agreement. That the Contractor chose at this stage to rely on these assurances is unfortunate, but **it is unlikely that a separate, collateral agreement will be found without further, and considerably more substantial, evidence. Horizons & Co. therefore require further instruction in order to provide fuller advice, and China State are encouraged to provide as much documentation in regards to these events as possible. At the very least, this was an acknowledgment of debt by the Employer.**

### Opinion – Issue 3 – Suspension of Works

#### Clause 16.1 – Contractor's Entitlement to Suspend Work

If the Engineer fails to certify in accordance with Sub-Clause 14.6 [*Issue of Interim Payment Certificates*] or the Employer fails to comply with Sub-Clause 2.4 [*Employer's Financial Arrangements*] or Sub-Clause 14.7 [*Payment*], **the Contractor may, after giving not less than 21 days' notice to the Employer, suspend work (or reduce the rate of work) unless and until the Contractor has received the Payment Certificate, reasonable evidence or payment**, as the case may be and as described in the notice.

The Contractor's action shall not prejudice his entitlements to financing charges under Sub-Clause 14.8 [*Delayed Payment*] and to termination under Sub-Clause 16.2 [*Termination by Contractor*].

If the Contractor subsequently receives such Payment Certificate, evidence or payment (as described in the relevant Sub-Clause and in the above notice) before giving a notice of termination, the Contractor shall resume normal working as soon as is reasonably practicable.



If the Contractor suffers delay and/or incurs Cost as a result of suspending work (or reducing the rate of work) in accordance with this Sub-Clause, the Contractor shall give notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [*Contractor's Claims*] to:

- (a) an extension of time for any such delay, if completion is or will be delayed. under Sub-Clause 8.4 [*Extension of Time for Completion*]; and
- (b) payment of any such Cost, plus reasonable profit, which shall be included in the Contract Price.

After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine these matters.

25. Clause 16.1 is repeated in full.

26. Analysis of suspension of works under the Contract is similar to that in regards to reduction of works. 21 days' notice was required to effect suspension of work under the contract, unless the Payment certificate, reasonable evidence, or payment were received.

27. UAE law also provides strong protection to contractors who suspend work for non-payment of claims:

#### UAE Civil Code, Article 247

In contracts binding upon both parties, if the mutual obligations are due for performance, each of the parties may refuse to perform his obligation if the other contracting party does not perform that which he is obliged to do.

28. As a matter of general principle, a failure by one party to perform its part of a mutual obligation releases the other from any corresponding obligation. The Dubai Cassation, Case No. 90/1995 dated 5 November 1995, found:



*"It is established in binding agreements that each party may, if corresponding obligations are outstanding, decline to perform its obligations if the other party fails to perform its obligation. This means that a purchaser may withhold the purchase price even if it was due and payable, until the seller has performed the corresponding obligation, unless the purchaser has waived such right after it accrued or if the contract contains a provision preventing the purchaser from applying such right."*

29. In its 4 April 2021 letter, the Contractor stated that it would not be responsible for suspension of performance. Such did not effect suspension of the Works. This was stated in the Employer's correspondence of 5 April 2021, in which the Employer reiterated the provisions of Clause 16.1 and the 21-day notice requirement.
30. In its letter dated 1 June 2021, the Contractor used language indicating the prospect of a suspension (*"Under these worsening circumstances the Contract is required under the contracts terms sub clause 16.1 to notify the Employer that after 21 days suspension of the works may be necessary should overdue payment not be received."*). On 27 June 2021, the Contractor sent a letter to the Employer stating that it *"must consider actions available as stipulated under the Conditions of Contract Sub-Clause 16.1..."* On 5 August 2021, the Contractor wrote to the Employer stating it *"may suspend the works..."* None of these effected the suspension of contract works.
31. On 30 August 2021, the Contractor sent a letter to the Employer in which it stated that it *"regretfully have no other choice but to suspend the Work per Ref: CSCECME/MM/PD-AH/2021/065 in accordance with Sub-Clause 16.1 of the Conditions of Contract. The suspension of works will start from 01<sup>st</sup> September 2021."* The earlier letter cited has not been provided to Horizons & Co.
32. On 6 September 2021, the Contractor sent the Employer a letter that stated they *"hereby inform that the Work is suspended effective from 1<sup>st</sup> September 2021 in accordance with Sub-Clause 16.1 of the Conditions of Contract."*
33. The following analysis proceeds ignoring the earlier letter, which is requested from the Contractor's representatives.

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34. No formality requirements are found in the (modified) FIDIC contract that forms the basis of the Parties' Contract. No guidance in relation to the 1999 FIDIC contract implies any formality. UAE law does not provide for formality in regards to the suspension of construction works or anything similar (e.g., Arts 19, 146(2), 193, 210, 471). Finally, the rules of the DIFC-LCIA do not require formality in this regard.
35. It is therefore arguable that the Contractor effected notification of suspension on 30 August, and thus was validly suspending works on 20 September 2021. **If this is the case, the Contractor was non-compliant with the Contract for 19 days, from 1 September 2021 to 19 September 2021.**
36. In the event that the words, "*hereby inform*" carry special weight, then the Contractor effected notification of suspension on 6 September 2021, and was validly suspending works on 27 September 2021. **If this is the case, the Contractor was non-compliant with the Contract for 26 days, from 1 September 2021 to 26 September 2021.**
37. **It is therefore arguable that the Contractor validly suspended works, but in both scenarios documented to Horizons & Co., the Contractor was non-compliant with the Contract for a period of time. This creates exposure for the Contractor.**

#### Opinion – Issue 4 – Claim for Unpaid Interim Payment Certificates

##### Clause 14.3 – Application for Interim Payment Certificates

The Contractor shall submit a Statement in six copies to the Engineer after the end of each month, in a form approved by the Engineer, showing in detail the amounts to which the Contractor considers himself to be entitled, together with supporting documents which shall include the report on the progress during this month in accordance with Sub-Clause 4.21 [Progress Reports].

The Statement shall include the following items, as applicable, which shall be expressed in the various currencies in which the Contract Price is payable, in the sequence listed:



1. The estimated contract value of the Works executed and the Contractor's Documents produced up to the end of the month (including the Variations but excluding items described in sub-paragraphs (b) to (g) below);
2. Any amounts to be added and deducted for changes in legislation and changes in cost, in accordance with Sub-Clause 13.7 [*Adjustments for Changes in Legislation*] and Sub-Clause 13.8 [*Adjustments for Changes in Cost*];
3. Any amount to be deducted for retention, calculated by applying the percentage of retention stated in the Appendix to Tender to the total of the above amounts, until the amount so retained by the Employer reaches the limit of Retention Money (if any) stated in the Appendix to Tender;
4. Any amounts to be added and deducted for the advance payment and repayments in accordance with Sub-Clause 14.2 [*Advance Payment*];
5. Any amounts to be added or deducted for Plant and Materials in accordance with Sub-Clause 14.5 [*Plan and Materials intended for the Works*];
6. Any other additions or deductions which may have become due under the Contract or otherwise, including those under Clause 20 [*Claims, Disputes and Arbitration*]; and
7. The deduction of amounts certified in all previous Payment Certificates.

#### Clause 14.6 – Issue of Interim Payment Certificates

No amount will be certified or paid until the Employer has received and approved the Performance Security. Thereafter, the Engineer shall, within 28 days after receiving a Statement and supporting documents, issue to the Employer an Interim Payment Certificate which shall state the amount which the Engineer fairly determines to be due, with supporting particulars.

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However, prior to issuing the Taking-Over Certificate for the Works, the Engineer shall not be bound to issue an Interim Payment Certificate in an amount which would (after retention and other deductions) be less than the minimum amount of Interim Payment Certificates (if any) stated in the Appendix to Tender. In this event, the Engineer shall give notice to the Contractor accordingly.

An Interim Payment Certificate shall not be withheld for any other reason, although:

- (a) If any thing supplied or work done by the Contractor is not in accordance with the Contract, the cost of rectification or replacement may be withheld until rectification or replacement has been completed; and/or
- (b) If the Contractor was or is failing to perform any work or obligation in accordance with the Contract, and had been so notified by the Engineer, the value of this work or obligation may be withheld until the work or obligation has been performed.

The Engineer may in any Payment Certificate make any correction or modification that should properly be made to any previous Payment Certificate. A Payment Certificate shall not be deemed to indicate the Engineer's acceptance, approval, consent, or satisfaction.

#### Clause 14.7 – Payment (as amended)

The Employer shall pay to the Contractor:

- (a) the first instalment of the advance payment within 42 days after issuing the Letter of Acceptance or within 21 days after receiving the documents in accordance with Sub-Clause 4.2 [Performance Security] and Sub-Clause 14.2 [Advance Payment], whichever is later;
- (b) [The employer shall pay the Contractor, the amount certified in each Interim Payment Certificate within 30 days after certification]; and



(c) the amount certified in the Final Payment Certificate within 56 days after the employer received the employment certificate.

Payment of the amount due in each currency shall be made into the bank account, nominated by the Contractor. in the payment country (for this currency) specified in the Contract.

38. The position under UAE law in regards to payment certificates is straightforward. Ordinarily, a claimant has the burden of proving the existence of a debt, and thereafter the burden shifts to a defendant to prove that the debt has been discharged. However, there is a presumption that payment is due in respect of an amount included in a payment certificate issued by a consultant. (Dubai Cassation No. 167/1998 dated 6 June 1998.) A contractor is not similarly bound by a consultant's certificate. (Abu Dhabi Cassation Nos. 43, 78 and 161/4 dated 31 March 2010).

39. In the present case, the Engineer has certified Interim Payment Certificates 36-42 in the schedule below.

- a. Interim Payment Certificate #36 including VAT due 1 April 2021 AED 9,704,063.07
- b. Interim Payment Certificate #37 including VAT due 1 May 2021 AED 7,057,910.06
- c. Interim Payment Certificate #38 including VAT due 2 June 2021 AED 7,537,702.69
- d. Interim Payment Certificate #39 including VAT due 2 July 2021 AED 4,181,788.85
- e. Interim Payment Certificate #40 including VAT due 1 August 2021 AED 2,254,859.65
- f. Interim Payment Certificate #41 including VAT due 1 Sept 2021 AED 2,372,200.78.
- g. Interim Payment Certificate #42 including VAT due 1 Oct 2021 AED 2,396,232.70.

40. The Client is requested to confirm these figures, and confirm that IPCs #41 and #42 have been certified.

41. In subsequent correspondence, it appears that the Employer has acknowledged its debt to the Contractor. On 5 April 2021, the Employer wrote to the Contractor and stated that IPC #36 was being processed for payment. On 13 June 2021, the Employer wrote to the Contractor, discussing a "tentative payment plan" and "payment to bill no 36, 37, & 38 will be settled by the end of June." Whether or not these statements create new or collateral contractual relations (discussed *supra*) does not affect their character as acknowledgement of debt.



42. No evidence has been presented to Horizons & Co. to rebut the presumption in favour of the Contractor. It is unknown what evidence would be capable of rebutting this presumption. The fact that these debts have been certified by way of Interim Payment Certificate appears to indicate that the Employer has acknowledged these IPCs as debts. The Employer's own statements appear to acknowledge its debts. That the Contractor is owed these sums of money appears to be proven strongly. Therefore, this issue does not appear to be in dispute; rather, it is the non-payment of these debts that is the principal source of dispute in the present case.
43. An arbitral tribunal would be well positioned to dispose of this issue.

#### Opinion – Issue 5 – Claim for Financing Charges

##### Clause 14.8 – Delayed Payment

If the Contractor does not receive payment in accordance with Sub-Clause 14.7 [Payment], the Contractor shall be entitled to receive financing charges compounded monthly on the amount unpaid during the period of delay. This period shall be deemed to commence on the date for payment specified in Sub-Clause 14.7 [Payment], irrespective (in the case of its sub-paragraph (b) of the date on which any Interim Payment Certificate is issued.

Unless otherwise stated in the Particular Conditions, these financing charges shall be calculated at the annual rate of three percentage points above the discount rate of the central bank in the country of the currency of payment, and shall be paid in such currency.

The Contractor **shall be entitled to this payment without formal notice or certification**, and without prejudice to any other right or remedy.

44. It is clear that Clause 14.8 provides an express contractual entitlement to financing charges. Such award, if valid, is not at the discretion of an arbitral tribunal.
45. It is the understanding of Horizons & Co that FIDIC Clause 14.8 does not offend Islamic principles or is not in the UAE adjudged so to do; rather, interest is permitted on the basis that it represents



compensation for “*presumed*” damage for delaying payment in breach of an obligation (Federal Supreme Court No. 371/18 dated 30 June 1998, 332/21 dated 25 September 2001 and 371/21 dated 24 June 2001).

46. Furthermore, as Clause 14.8 provides an express contractual entitlement to financing charges, it is submitted that such entitlement is not in the way of damages or extracontractual or ancillary or additional charges. **As such, it is arguable that the financing charges for delayed payment under Clause 14.8 do not fall under Clause 20.1.**

### Opinion – Issue 6 – Claims

#### Clause 20.1 – Contractor’s Claims

If the Contractor considers himself to be entitled to any extension of the Time for Completion **and/or any additional payment**, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than [14] days after the Contractor became aware, or should have become aware, of the event or circumstance.

If the Contractor fails to give notice of a claim within such period of [14] days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this Sub-Clause shall apply.

The Contractor shall also submit any other notices which are required by the Contract, and supporting particulars for the claim, all as relevant to such event or circumstance.

The Contractor shall keep such contemporary records as may be necessary to substantiate any claim. either on the Site or at another location acceptable to the Engineer. Without admitting the Employer’s liability, the Engineer may, after receiving any notice under this Sub-Clause, monitor the record-keeping and/or instruct the Contractor to keep further contemporary

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records. The Contractor shall permit the Engineer to inspect all these records. and shall (if instructed) submit copies to the Engineer.

Within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the claim. or within such other period as may be proposed by the Contractor and approved by the Engineer. the Contractor shall send to the Engineer a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed. If the event or circumstance giving rise to the claim has a continuing effect:

- a) this fully detailed claim shall be considered as interim:
- b) the Contractor shall send further interim claims at monthly intervals, giving the accumulated delay and/or amount claimed. and such further particulars as the Engineer may reasonably require: and
- c) the Contractor shall send a final claim within 28 days after the end of the effects resulting from the event or circumstance. or within such other period as may be proposed by the Contractor and approved by the Engineer.

Within 42 days after receiving a claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Engineer and approved by the Contractor, the Engineer shall respond with approval, or with disapproval and detailed comments. He may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim within such time.

Each Payment Certificate shall include such amounts for any claim as have been reasonably substantiated as due under the relevant provision of the Contract. Unless and until the particulars supplied are sufficient to substantiate the whole of the claim, the Contractor shall only be entitled to payment for such part of the claim as he has been able to substantiate.

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The Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine (i) the extension (if any) of the Time for Completion (before or after its expiry) in accordance with Sub-Clause 8.4 [*Extension of Time for Completion*] and/or (ii) the additional payment (if any) to which the failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under the second paragraph of this Sub-Clause.

47. There is a tension between Clause 14.8 and Clause 20.1 in that Clause 20.1 due to the presence of the words “*and/or any additional payment*” in Clause 20.1.
48. It is conceivable that a tribunal could find that a claim under Clause 14.8 falls within Clause 20.1, as it constitutes an “*additional payment*”. The processing of financing charges under Clause 14.8 is not found within Clause 14.7.
49. Against this might be said:
- a. The rule of interpretation known as *noscitur a sociis* holds that a word will be judged in its context, by reference to the words around it. The context here are the words “extension of the Time for Completion” and “event or circumstance” giving rise to the claim for EOT. Non-payment of moneys owing is an event or circumstance only in the barest manner and hardly requires evaluation by an Engineer.
  - b. The word “*additional*” implies that the payment is in addition to something, presumably the sums due under the contract, just as an extension of time is an extension of time due under the contract.
  - c. Clause 14.8 states, “***The Contractor shall be entitled to this payment without formal notice or certification, and without prejudice to any other right or remedy.***” The provisions of Clause 20.1 explicitly envision formal notice, e.g., “*the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim*”; “*the Engineer may, after receiving any notice under this Sub-Clause...*”; etc. These provisions would appear to defeat the explicit language of Clause 14.8 if payment under Clause 14.8 had to be noticed to the Engineer.



50. It is therefore arguable that the Contractor need not make an application or file notice with the Engineer in regards to any claim under Clause 14.8 for financing charges. However, the Contractor is advised to make such a claim out of an abundance of caution, if the Contractor's finances permit as such.

### Opinion – Issue 7 – Arbitration and Jurisdiction

#### Clause 20.2 (inserted by Particular Conditions) – Arbitration

Any dispute or difference arising out of or in connection with this agreement including any question regarding its existence, validity, or termination, shall be firstly settled amicably within 14 days from the date of the dispute being notified in writing by either party, unless settled amicably, the dispute shall be finally resolved by arbitration under the Arbitration rules of the DIFC-LCIA arbitration centre which rules are deemed to be incorporated by reference to this clause. The number of arbitrators shall be three. The seat or legal place of arbitration shall be Dubai International Financial Centre, Dubai, UAE. The language used in the arbitration shall be English.

51. This arbitration clause is straightforward.

52. First, the breadth of its jurisdiction must be noted: *“any dispute or difference arising out of or in connection with this agreement”*. This jurisdiction includes the possible matter of a side or collateral agreement that has arisen in regards to assurances made by the Employer in regards to its financing arrangements in May, June, and August 2021.

53. This arbitration clause contains the standard elements of an arbitration clause:

- a. The arbitration will likely be resolved under the arbitration rules of the DIFC-LCIA. Decree No. 34 of 2021, which abolishes the DIFC-LCIA Arbitration Centre and amalgamates it into the DIAC, has introduced uncertainty in regards to the rules that apply to arbitrations. In regards to existing arbitrations, the rules chosen will continue unaffected; however, in regards to new arbitrations, DIAC Rules will apply. It is a general principle of arbitration

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law that the parties are able to choose their own rules, and it appears that the Parties in the present case have already elected to use DIFC-LCIA Rules, which will continue to exist as a historical document; however, arbitration in the present case has not yet been filed. It has been announced that DIAC will soon introduce new rules reconciling it with the Decree; it is at a minimum expected that if parties file a new arbitration electing to use DIFC-LCIA Rules before the new DIAC Rules are promulgated, that election will be given effect. However, uncertainty exists as to whether parties will be allowed to elect to use DIFC-LCIA Rules after the new DIAC rules are promulgated. It is believed that the new DIAC Rules will follow UNCITRAL principles. None of this should be alarming to the client: it is unlikely that a change in rules will affect substantive outcomes; the UNCITRAL Rules are well known and trusted; and it is likely that the parties will be allowed to elect to use DIFC-LCIA Rules after the promulgation of the new DIAC Rules.

- b. There shall be three arbitrators.
  - c. The seat of arbitration shall be the DIFC.
  - d. The language of the arbitration shall be English.
54. It should be noted again that the governing law of the Contract is that of the United Arab Emirates. This law will govern how the substantive terms of the Contract are interpreted.
55. Of critical note is the process by which arbitration is commenced:
- a. First, the Contractor must notify the Employer of a dispute. It is by the letter provided in addition to this Opinion that the Contractor will fulfil this requirement.
  - b. Over the next 14 days, the Contractor must attempt to resolve the dispute amicably with the Employer. The Contractor must provide evidence in writing as to its attempts to amicably resolve its dispute as a precondition to arbitration.
  - c. After 14 days, the Contractor may initiate arbitration. Pursuant to Decree No. 34 of 2021, the arbitration will be administered by DIAC, seated in the DIFC.
56. Failure to follow this process may result in the Tribunal ruling that it lacks jurisdiction to hear the dispute.
- 57. If the Contractor wishes to commence arbitration, it must strictly follow the process outlined above. Given that the promulgation of new DIAC Rules is expected shortly, if the Contractor**



wishes to have its dispute heard under DIFC-LCIA rules, the Contractor faces potential exposure and is encouraged to commence this process presently.

### Opinion – Issue 8 – Termination

#### Clause 16.2 – Termination

**The Contractor shall be entitled to terminate the Contract if:**

- (a) the Contractor does not receive the reasonable evidence within 42 days after giving notice under Sub-Clause 16.1 [*Contractor's Entitlement to Suspend Work*] in respect of **a failure to comply with Sub-Clause 2.4** [*Employer's Financial Arrangements*];
- (b) the Engineer fails, within 56 days after receiving a Statement and supporting documents, to issue the relevant Payment Certificate;
- (c) **the Contractor does not receive the amount due under an Interim Payment Certificate within 42 days after the expiry of the time stated in Sub-Clause 14.7** [*Payment*] **within which payment is to be made** (except for deductions in accordance with Sub-Clause 2.5 [*Employer's Claims*]);
- (d) **the Employer substantially fails to perform his obligations under the Contract;**
- (e) the Employer fails to comply with Sub-Clause 1.6 [*Contract Agreement*] or Sub-Clause 1.7 [*Assignment*];
- (f) a prolonged suspension affects the whole of the Works as described in Sub-Clause 8.11 [*Prolonged Suspension*]; or
- (g) the Employer becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against him, compounds with his creditors, or carries on business under a receiver, trustee or manager for the benefit of his creditors, or if any



act is done or event occurs which (under applicable Laws) has a similar effect to any of these acts or events.

In any of these events or circumstances, **the Contractor may, upon giving 14 days' notice to the Employer, terminate the Contract.** However, in the case of subparagraph (f) or (g), the Contractor may by notice terminate the Contract immediately.

**The Contractor's election to terminate the Contract shall not prejudice any other rights of the Contractor, under the Contract or otherwise.**

58. According to the provisions of the Contract, the Contractor may terminate the Contract upon 14 days' notice.
59. In the present case, the Contractor has multiple grounds upon which to terminate its Contract with the Employer:
60. The Employer has not provided reasonable evidence of financial arrangements, pursuant to Clause 2.4.
61. The Contractor has not received payment under IPCs 36-42 within 42 days after the expiry of the time stated in Sub-Clause 14.7.
62. The Employer has substantially failed to perform its obligations under the Contract by providing no evidence that it is capable or willing to pay the sums of money owed to the Contractor.

#### Civil Code – Article 271

The parties may agree that in case of non-performance of the obligations deriving from the contract, the contract will be deemed to have been “ipso facto” without need to obtain a court order. Such an agreement does not release the parties from the obligation of serving a formal notification, unless the parties agree that such notification is dispensed with.

63. Article 271 of Federal Law No. 5/1985 provides that the parties can agree for a contract to be terminated, in the event of non-performance by one of the parties, without the need to obtain



a court order. However, Article 271 of Federal Law No. 5/1985 expressly mandates that the party claiming termination must serve formal notice, unless the parties have stipulated otherwise in their contract.

64. Article 271 confirms the Contractor's right to terminate its contract, and confirms that notice must be given to the Employer. **The Contractor must document its attempts at amicable settlement and must give the Employer 14 days' notice.**

#### Article 274 – Effects of Contract's Dissolution

When a contract is or shall be rescinded, the two contracting parties shall be reinstated to their former position, prior to contracting, and in case this is impossible, the Court may award damages.

65. Under UAE law, damages are available upon termination. The Contractor will have a case for damages if damages can be proved.
66. Under UAE law, it has also been held that as a construction contract is a continuing contract termination does not affect the parties' accrued rights, including the right to be paid for work performed, which are not extinguished on termination. (Abu Dhabi Cassation No. 293/3 dated 27 May 2009, Dubai Cassation No. 50/2008 dated 27 May 2008 and Federal Supreme Court No. 213/23 dated 8 June 2003.)
67. As such, termination will not affect the Contractors rights to be paid under IPC 36-42. This is provided for by both the Contract and by general principles of UAE law.
68. The Contract deals with payments and other matters after termination.

#### Clause 16.3 – Cessation of Work and Removal of Contractor's Equipment

After a notice of termination under Sub-Clause 15.5 [*Employer's Entitlement to Termination*], Sub Clause 16.2 [*Termination by Contractor*], or Subclause 19.6 [*Optional Termination, Payment and release*] has taken effect, the Contractor shall promptly:



- (a) Cease all further work, except for such work as may have been instructed by the Engineer for the protection of life or property or for the safety of the Works;
- (b) Hand over Contractor's Documents, Plant, Materials and other work, for which the Contractor has received payment, and
- (c) Remove all other Goods from the Site, except as necessary for safety, and leave the Site.

69. These provisions are self-explanatory and logical.

#### Clause 16.4 – Payment on Termination

After a notice of termination under Sub-Clause 16.2 [*Termination by Contractor*] has taken effect, the Employer shall promptly:

- (a) Return the Performance Security to the Contractor;
- (b) Pay the Contractor in accordance with Sub-Clause 19.6 [*Optional Termination, Payment and Release*], and
- (c) Pay the Contractor the amount of any loss of profit or other loss or damage sustained by the Contractor as a result of this termination.

70. Sub-Clause 19.6 refers to *force majeure* provisions and is not relevant.

71. Sub-Clause 16.4(c) provides a contractual claim for damages, to be read along with the legislative provisions cited above. This clause does not affect the accrued rights to payment under the IPCs discussed above.



**Options Available to Contractor**

72. Based on the foregoing, we are of the opinion that the Contractor has several options open to it.
73. The Contractor should issue a formal Notice of Dispute using language that indicates such. This proposed letter accompanies this Opinion.
74. The Contractor should consider its position and note its potential exposure in regards to its earlier notice of reduction of works and its earlier notice of suspension, and this will be a major focus of any defence raised by the Employer to these claims.
75. The Contractor must follow the proper procedure in bringing a claim for arbitration including evidenced genuine efforts to solve this matter amicably for 14 days before filing a request for arbitration. This is a condition precedent to the Arbitration.
76. Possible claims in Arbitration include:
- Pursuant to Clause 14.7, refer the claim for breach of payment clause, i.e., the non-payment of certified sums of money from 36 to 42. We have identified the issue surrounding inadequate notice of the reduction of works in the letter of 19 April 2021 but can make an argument that notice was effective 21 days from the 19<sup>th</sup> April 2021. We could attempt to make an argument that notice was not necessary due to knowledge by the Employer of the hardship caused to the Contractor in earlier correspondence including 4 April 2021 but this weaker argument would have to be substantiated by evidence of the hardship including claims, expenses or notices sent by the suppliers to the contractor.
  - Pursuant to Clause 14.8, claim financing charges.
  - Pursuant to Clause 2.4, claim there is a failure to provide evidence of financial arrangements.
  - Associated costs.
77. Claim in arbitration that the meeting of 31 May 2021 amended the payment terms by creating a new obligation to pay IPCs # 36, 37, and 38 by the end of June and that this amendment of terms is a separate ground of contractual liability. As stated, this argument is arguable but not strong.

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78. The Contractor should articulate its position regarding the performance bond and guarantee cheque, and the consequences that arbitration and termination will have in regards to them.
79. The Contractor may terminate its Contract with the Contractor by giving 14 days' notice and clearly evincing an intention to terminate.

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**Appendix: Narrative**

1. On 28 February 2021, the Engineer wrote to the Contractor rejecting its revised programme, noting an inconsistency between the software the Contractor was using to evaluate its progress and observations on-site. This includes submission of low-value IPCs and inadequate resources, and recommends increasing resources. (Exhibit 1)
2. Also on 28 February 2021, the Engineer wrote to the Contractor, rejecting its claim for force majeure as it had not been notified within 14 days of becoming aware of the event. (Exhibit 2)
3. On 7 March 2021, the Engineer wrote to the Contractor, reiterating its belief that the Contractor's methodology to evaluate its progress was flawed, and requesting that it deploy more resources. (Exhibit 3)
4. On 22 March 2021, the Engineer wrote to the Contractor, stating that its revised programme was insufficient, as it only discussed the completion date, not sequencing or the method of preparation, and reiterating its belief that progress had not been achieved. (Exhibit 4)
5. On 28 March 2021, the Contractor wrote to the Employer stating that Interim Payment Certificate #36 was due, in a sum of AED 9,704,063.07. (Exhibit 1) On 4 April 2021, the Contractor wrote to the Employer stating that IPC #36 had not been paid, and therefore that it could not pay its subcontractors. The Contractor instructed the Employer to pay immediately in order to avoid interruptions, and stated that it would not be responsible for delays, reductions in performance, and suspension of performance. (Exhibit 5)
6. On 4 April 2021, the Engineer wrote to the Contractor, stating that the force majeure issue had already been dealt with in the February 2021 correspondence. (Exhibit 6)
7. On 4 April 2021, the Contractor wrote to the Employer stating that IPC #36 was overdue, and that it would not be held liable for reduction or suspension of the Works. (Exhibit 7)

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8. On 5 April 2021, the Employer wrote to the Contractor, stating that it had given only 4 days' notice, but that 21 days' notice was needed to effect suspension of works properly under the contract. (Exhibit 8)
9. On 18 April 2021, the Engineer wrote to the Contractor, stat that it had not provided a sufficient revised programme; it had declined to provide information regarding critical MEP testing and commission. (Exhibit 9)
10. On 19 April 2021, the Contractor wrote to the Employer stating that it was unable to pay its subcontractors and suppliers due to the Employer's non-payment, and that it would reduce the rate of works from 22 April 2021. It also reminded the Employer that the Employer would be liable for remobilization delays and costs. (Exhibit 10)
11. On 22 April 2021, the Contractor wrote to the Engineer to explain to the Engineer that the delay in the payment under IPC #36 would create Risk Event #17, and that it would analyse the intermediate and final impact. (Exhibit 11)
12. On 29 April, the Engineer responded to the claimant, stating that it would await details regarding impact. It reiterated that the Contractor was required to demonstrate demobilization after 22 April 2021 in order to demonstrate remobilization. (Exhibit 12)
13. On 29 April 2021, the Contractor wrote to the Employer, stating that IPC #36 was overdue and that IPC #37 was now due. The Contractor requested that the Employer release both IPC #36 and PIC #37 *"to enable Contractor to resume normal working as soon as is reasonably practicable."* (Exhibit 13)
14. On 4 May 2021, the Contractor wrote to the Engineer, enclosing an Interim Delay Impact Report, in which it outlines delays to MEP works, ID works, and others. It also noted manpower reductions. (Exhibit 14)
15. On 9 May 2021, the Engineer wrote to the Contractor, acknowledging the revised programme, but also stating that a revised programme had been required of the Contractor in February 2021. (Exhibit 15)

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## مكتب أبوظبي

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16. On 20 May 2021, the Contractor wrote to the Engineer, providing an extensive Extension of Time for Completion claim with a deficit of 64 days. In this document, the Contractor repeated the correspondence cited above to show that it had been unable to release overdue payments to subcontractors and suppliers. (Exhibit 16)
17. On 23 May, the Engineer wrote to the Contractor, stating that once the delay event was concluded and upon submission of final claim substantiation, it would engage in claim analysis. (Exhibit 17)
18. On 27 May 2021, the Contractor wrote to the Employer to request that it provide reasonable evidence of financial arrangement, pursuant to Sub-Clause 2.4 of the General Conditions of Contract. (Exhibit 18)
19. On 1 June 2021, the Contractor wrote to the Employer, stating that PICs # 36, 37, and 38 had not yet been received. It also stated that it had used up and that it had reduced its rate of work. **It cited Clause 16.1, regarding the 21-day notice requirement, but did not invoke it.** (Exhibit 19)
20. On 6 June 2021, the Contractor wrote to the Engineer, citing the failure of the Employer to pay PICs #36, 37, and now 38, attaching Interim Delay Impact Report #2 (Exhibit 20)
21. On 7 June 2021, the Engineer wrote to the Contractor, stating that its Delay Impact Report #2 was non-specific in nature and required a factual quantitative record. (Exhibit 21)
22. On 13 June 2021, the Employer wrote an email to the Contractor, stating that *“our tentative payment plan is... payment to bill no 36, 37, & 38 will be settled by the end of June”*. It also stated that its discussions with its bank *“whilst very well advanced and positive, will only be finalized this coming week pending a final executive management meeting and we will keep you posted if there is any changes in the above mentioned plan.”* (Exhibit 22)
23. On 15 June 2021, the Contractor wrote to the Engineer including a detailed, if not fully explicated factual record. (Exhibit 23)

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## مكتب أبوظبي

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## مكتب دبي

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☎ +٩٧١ ٤ ٣٥٤ ٤٤٤٥ 📠 +٩٧١ ٤ ٣٥٤ ٤٤٤٤

24. On 20 June 2021, the Contractor wrote to the Engineer, including its Extension of Time #10, detailing Delay Event #17, providing an extensive Extension of Time for Completion claim with a deficit of 97 days. (Exhibit 24)
25. On 23 June 2021, the Contractor wrote to the Employer repeating the sentence (without context) *"Payment to bill no 36, 37, & 38 will be settled by end of June."* Then the Contractor stated that based on this promise, the Contractor had committed to the plans of its subcontractors and suppliers. (Exhibit 25)
26. On 27 June 2021, the Contractor wrote to the Employer, stating that it was running out of essential supplies, that its equipment and plant were exposed, and that it had exhausted all methods for continuing work. (Exhibit 26)
27. On 12 July 2021, the Engineer wrote to the Contractor, stating that it was not in control of the release of funds, nor recommend the release of the Contractor's staff. All it could do was to recommend it rationalize its staff-to-labour ratios and submit them to the Engineer. (Exhibit 27)
28. On 12 July 2021, the Contractor wrote to the Engineer requesting advice regarding the termination of staff in order to mitigate its costs, despite creating prolongation costs later on. (Exhibit 21) On 13 July 2021, the Contractor sent a nearly identical letter to the Employer (Exhibit 28)
29. On 13 July 2021, the Contractor wrote a letter to the Employer stating that it had submitted a claim for EOT to the Engineer, and requesting the Employer's guidance regarding overhead costs, specifically related to manpower and whether it should reduce its staffing levels. (Exhibit 29)
30. On 18 July 2021, the Contractor wrote to the Engineer, including a revised Interim Extension of Claim, with a deficit of 126 days. (Exhibit 30)
31. On 18 July 2021, the Engineer wrote to the Contractor, stating that its claim was an ongoing event, and that it would review the final EOT claim when received. (Exhibit 31)



32. On 25 July 2021, the Contractor wrote to the Engineer, again seeking advice regarding staffing and mobilization. (Exhibit 32)
33. On 26 July 2021, the Engineer wrote to the Contractor, deflecting its queries. It stated that commercial decisions were for the Contractor to decide. It stated that if the Employer had stated the project was overstaffed, it should follow that advice. (Exhibit 33)
34. On 5 August 2021, the Contractor wrote to the Employer, noting that now four IPCs had not been paid, stating that it may suspend or reduce its work. (Exhibit 34)
35. On 17 August 2021, the Contractor wrote to the Employer, mentioning a meeting that took place on 4 July 2021 and memorializing the discussion that took place at the meeting held on 11 August 2021. At this meeting, the Parties discussed new negotiations regarding project finance with CBD, a bank; the Contractor replaced its performance bond with a security cheque; discussions with “His Highness” regarding funding; the release of a payment of between AED 3 and 5 million; and supply chain disruptions due to lack of payment (Exhibit 35)
36. On 18 August 2021, the Contractor wrote to the Engineer, including a revised Interim Extension of Claim, with a deficit of 156 days. (Exhibit 36)
37. On 30 August 2021, the Contractor wrote to the Employer, stating that IPCs #36-40 were now overdue, that IPC #41 was due, and that a cumulative payment of AED 33,108,525.10 was now due. It stated that it would exercise its rights under Clause 16.1 and suspend works from 1 September 2021. (Exhibit 37)
38. On 6 September 2021, the Contractor sent a letter to the Employer, informing the Employer of its suspension of work on 1 September 2021. It stated that during the reduction period (misstated as the suspension period) it had sought to maintain essential works. It noted that the Employer had not responded to its letters regarding staffing. Finally, it mentioned there had been no follow up regarding finance due mid-September. (Exhibit 38)



**Applicant Details**

First Name	<b>Margaret</b>
Middle Initial	<b>A</b>
Last Name	<b>McCallister</b>
Citizenship Status	<b>U. S. Citizen</b>
Email Address	<a href="mailto:mam804@georgetown.edu">mam804@georgetown.edu</a>
Address	<div> <b>Address</b>  <b>Street</b>  <b>901 H Street NE, Apartment 746</b>  <b>City</b>  <b>Washington</b>  <b>State/Territory</b>  <b>District of Columbia</b>  <b>Zip</b>  <b>20002</b>  <b>Country</b>  <b>United States</b> </div>
Contact Phone Number	<b>415-819-1207</b>

**Applicant Education**

BA/BS From	<b>Princeton University</b>
Date of BA/BS	<b>June 2019</b>
JD/LLB From	<b>Georgetown University Law Center</b>
	<a href="https://www.nalplawschools.org/employer_profile?FormID=961">https://www.nalplawschools.org/employer_profile?FormID=961</a>
Date of JD/LLB	<b>May 19, 2024</b>
Class Rank	<b>School does not rank</b>
Law Review/Journal	<b>Yes</b>
Journal(s)	<b>Georgetown Law Journal</b>
Moot Court Experience	<b>Yes</b>
Moot Court Name(s)	<b>National Energy &amp; Sustainability Moot Court Competition</b>

**Bar Admission**

### **Prior Judicial Experience**

Judicial Internships/  
Externships      **Yes**  
Post-graduate Judicial  
Law Clerk      **No**

### **Specialized Work Experience**

### **Recommenders**

Colangelo, Sara  
sac54@law.georgetown.edu  
202-661-6543

Heinzerling, Lisa  
heinzerl@law.georgetown.edu

Butler, Paul  
pdb42@georgetown.edu  
(202) 662-9932

Summers, Nicole  
nicole.summers@georgetown.edu

**This applicant has certified that all data entered in this profile and  
any application documents are true and correct.**

**MARGARET A. MCCALLISTER**

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June 12, 2023

**The Honorable Leslie Abrams Gardner**

201 West Broad Avenue  
Albany, Georgia 31701

Dear Judge Gardner:

It is with great interest and enthusiasm that I submit this application for a 2024 clerkship in your chambers. I am a rising third-year law student at Georgetown University Law Center and a member of the *Georgetown Law Journal*.

I am confident that I could contribute meaningfully to your chambers. This past semester, I competed in the *West Virginia University Energy and Sustainability Moot Court Competition* on behalf of Georgetown Law's Appellate Advocacy team. I am proud to share that my team won the overall competition and earned second place for best brief. These accolades represent the countless hours of hard work spent learning the nuances of energy law, practicing techniques of oral argument, and brief writing. Next year, I have been selected to be a Law Fellow (teaching fellow for 1L legal writing) where I will work with first-year students on their legal writing while taking an advanced legal research and composition seminar.

I have attached my resume, writing sample, and law school transcript for your review. Professors Lisa Heinzerling, Paul Butler, Nicole Summers, and Sara Colangelo have submitted letters of recommendation on my behalf.

Thank you for your time and consideration. Please let me know if I can provide you with additional information.

Sincerely,  
Margaret McCallister  
Candidate for Juris Doctor 2024

**MARGARET A. MCCALLISTER**

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**EDUCATION****GEORGETOWN UNIVERSITY LAW CENTER****Washington, D.C.***Juris Doctor*

Expected May 2024

Journal: *Georgetown Law Journal* – Executive Symposium Editor**GPA: 3.67**

Research Asst: Georgetown Climate Center (Spring 2022); Prof. Kristen Tiscione (2022), Prof. Sara Colangelo (2023)

Honors: WVU Energy & Sustainability Moot Court Competition 2023 Winner and Best Brief Runner Up;  
Beaudry Moot Court Competition Semifinalist; Merit ScholarshipActivities: Law Fellow (2023-2024); Barristers' Council – *Appellate Advocacy Division*; Environmental Law Society**PRINCETON UNIVERSITY, SCHOOL OF ENGINEERING AND APPLIED SCIENCE****Princeton, NJ***Bachelor of Science in Engineering, cum laude*, in Civil and Environmental Engineering

June 2019

Honors: Society of Sigma Xi, Civil and Environmental Engineering Book Award

Activities: Mock Trial – *Captain*; Princeton Legal Journal (formerly Princeton Law Review) – *Managing Editor*;  
Outdoor Action – *Leader Trainer*; Tiger Inn – *President*Thesis: *The Impact of Wildfire Emissions: Ozone Precursors and their Contribution to Ambient Pollution*

Presented Thesis to NASA Health and Air Quality Applied Sciences Team (HAQAST) in January 2019

**EXPERIENCE****PERKINS COIE****Washington, D.C.***Summer Associate – Environment, Energy, and Resources Practice*

Summer 2023

**RISING FOR JUSTICE, HOUSING ADVOCACY AND LITIGATION CLINIC****Washington, D.C.***Student Attorney*

Spring 2022

- Represented clients in D.C. Superior Court eviction proceedings including initial hearings, *Bell* hearings, mediation, and trial
- Prepared and filed motions including answers, motions to dismiss, reply briefs, applications to stay writs of restitution, and motions to proceed *in forma pauperis*

**CLIMATE LEADERSHIP COUNCIL****Washington, D.C.***Extern*

Fall 2022

- Researched and analyzed international climate policy, focusing on solutions that leverage market forces

**CALIFORNIA FIRST DISTRICT COURT OF APPEAL****San Francisco, CA***Judicial Intern to the Honorable Alison M. Tucher*

Summer 2022

- Prepared bench memoranda and draft judicial opinions after substantive legal research on matters before the court

**ENVIRONMENTAL DEFENSE FUND****New York, NY***Carbon Pricing Analyst*

July 2019 – July 2021

- Worked collaboratively with 16 other expert teams in the Stanford Energy Modeling Forum 36 to assess climate policy in the wake of the Paris Agreement and future emissions trading strategies
- Developed an innovative modeling tool to derive a marginal abatement cost curves (MACCs) for every country separated by sector and gas to facilitate comparisons of counterfactual emissions trading scenarios

**MPALA RESEARCH CENTER****Nanyuki, Kenya***Research Assistant*

Summer 2018

- Monitored the grazing behavior of livestock species in the field for study on husbandry strategies in rangeland vegetation

**PUBLICATIONS**

- Gökçe Akin-Olçum ... **Margaret McCallister**, et. al, *A Model Intercomparison of the Welfare Effects of Regional Cooperation for Ambitious Climate Mitigation Targets*, CLIM. CHANGE ECON. 2350009 (2022)
- **Margaret McCallister** et. al, *Forest Protection and Permanence of Reduced Emissions*, 5 FRONTIERS IN FORESTS & GLOB. CHANGE 1 (2022)
- **Margaret McCallister**, Rosalinda Medrano, & Janet Wojcicki, *Early Life Obesity Increases the Risk for Asthma in San Francisco Born Latina Girls*, 39 ALLERGY & ASTHMA PROC. 273 (2018)

**INTERESTS**

- Baking (especially Claire Saffitz recipes), Backpacking, Crosswords, Yoga, Piano



**Georgetown Law**  
600 New Jersey Avenue, NW  
Washington, DC 20001

June 16, 2023

The Honorable Leslie Gardner  
C.B. King United States Courthouse  
201 West Broad Avenue, 3Rd Floor  
Albany, GA 31701-2566

Dear Judge Gardner:

It is with great enthusiasm that I write this letter of recommendation on behalf of Margaret McCallister. Margaret's intelligence, commitment to public interest legal work, and genuine passion for litigation would make her a very valuable addition to your chambers.

Margaret is a very bright, thoughtful, and insightful law student, who is capable of digesting complex legal issues extremely well. Margaret came highly recommended for a Research Assistant position due to her excellent research and writing skills. I invited Margaret to become my Research Assistant this fall and have been thrilled with her work thus far.

In each assignment I have given Margaret, her research has been thorough and on-point, her legal writing well organized and structured, and her conclusions accurate. She is highly professional, delivering work on time if not early, and always completing a polished product that exceeds my expectations for a 2L student. Margaret's strong performance has also been consistent across all media; both her writing and oral presentation are excellent. Her reputation for high quality, timely, and professional work are well known to Margaret's peers on her law journal as well. From their remarks, I understand her to be well respected by her colleagues and a strong collaborator with them on the journal.

Finally, Margaret's resume of experience evinces her thorough commitment to public service and litigation. Through her rigorous academics and practical experiences, Margaret is very well prepared for a clerkship. She would make an excellent addition to your staff, and I strongly recommend you consider her candidacy.

Please let me know if I can be of further assistance or answer any additional questions.

Sincerely,

/s/ SARA A. COLANGELO

Sara A. Colangelo  
Visiting Professor of Law  
Director, Environmental Law & Justice Clinic  
202.661.6543  
Sac54@law.georgetown.edu

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Georgetown Law  
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June 16, 2023

The Honorable Leslie Gardner  
C.B. King United States Courthouse  
201 West Broad Avenue, 3Rd Floor  
Albany, GA 31701-2566

Dear Judge Gardner:

I am writing, with great enthusiasm and anticipation, to recommend Margaret McCallister for a judicial clerkship with you.

I know Maggie well. She took my course in Administrative Law as an elective in her first year of law school, and this past spring she was a student in my course in Environmental Law. In both classes, Maggie distinguished herself with her level of preparation, incisive comments, and intellectual curiosity. Maggie relishes thinking through complicated legal questions and doesn't rest until she, by her own lights, gets them right. In both Administrative Law and Environmental Law, Maggie was in a small study group of four students who regularly appeared at my doorstep, right on the dot, at the appointed time for my office hours. These students were so well prepared, and so eager to get to the bottom of the legal questions we had discussed in class, that, to be honest, I sometimes found myself stumped! When that occurred, we all happily consulted our statutes and cases, emerging with fresh collective understanding. For a teacher, such an experience is delightful.

In both of the courses she took with me, Maggie performed well on the final exams, earning an A- both times out. Her exams were notable, in particular, for their close parsing of statutory language and their effective deployment of relevant judicial decisions. Maggie's impressive research and writing skills are also evident in her successful performances in two moot court competitions and her selection as the symposium editor for our flagship journal, the *Georgetown Law Journal*.

Among law students, Maggie also stands out by virtue of her serene composure; she just never gets rattled. Maggie's self-possession may be, at least in part, a function of her experiences leading backpacking trips during her undergraduate years at Princeton. She participated in Princeton's "Outdoor Action" program before starting her freshman year, and she loved it so much that she went on to become the lead trainer for the students who led the trips – a leader for the leaders, if you will. Outdoor Action's freshman trips plunge incoming students – many of whom have essentially no experience in the outdoors, let alone experience backpacking – into intense six-day backcountry experiences. By her own account, in leading the freshman trips and eventually leading the leaders on training trips, Maggie developed her capacity to communicate with clarity and to lead collaboratively. While backpacking might seem far afield from serving as a law clerk, I am confident that Maggie's experiences in the outdoors give her a special kind of composure that will be invaluable in the high-stakes setting of judicial chambers.

I recommend Maggie McCallister to you without reservation. I hope these comments are helpful to you in considering Maggie's application for a clerkship. Please let me know if I can be of any further assistance.

Sincerely,

Lisa Heinzerling  
Justice William J. Brennan, Jr. Professor of Law

Lisa Heinzerling - heinzerl@law.georgetown.edu

**Georgetown Law**  
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Washington, DC 20001

June 16, 2023

The Honorable Leslie Gardner  
C.B. King United States Courthouse  
201 West Broad Avenue, 3Rd Floor  
Albany, GA 31701-2566

Dear Judge Gardner:

I am writing to recommend Margaret McCallister as a law clerk. Maggie was a student in two of my courses at Georgetown Law. She received an "A" grade in each course. She engaged deeply with the curriculum and attended office hours often to discuss the nuances of the law, public policy rationales, and general thoughts about class discussion. In Criminal Law I selected Maggie to present on a topic that was both intellectually challenging and sensitive. She performed so well that I sent her an email after encouraging her to consider a career as a litigator.

Maggie is an incisive legal analyst and a first rate communicator. She holds an engineering degree from Princeton, and I suspect the critical thinking and analytical skills she learned there have benefitted her strong legal abilities. She has already published articles in scientific fields. Maggie recently assumed the position of Executive Symposium Editor of the prestigious Georgetown Law Journal. This also speaks to her excellent research and writing skills.

Maggie attended office hours very regularly, so I got to know her better than most students. She is a respectful, kind, and ambitious student with a great sense of humor. She is passionate about environmental justice, and I know she will have an extremely successful career as a lawyer. I think Maggie would be a spectacular law clerk, and a joy to have around chambers. I recommend her with great enthusiasm.

Sincerely,

Paul Butler  
Albert Brick Professor in Law

Paul Butler - [pdb42@georgetown.edu](mailto:pdb42@georgetown.edu) - (202) 662-9932

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June 16, 2023

The Honorable Leslie Gardner  
C.B. King United States Courthouse  
201 West Broad Avenue, 3Rd Floor  
Albany, GA 31701-2566

Dear Judge Gardner:

I write this letter to offer my strongest recommendation for Margaret McCallister's clerkship candidacy. I am an Associate Professor of Law at Georgetown University Law Center, and I had the pleasure of teaching Ms. McCallister during her 2L year in my Housing Law and Policy seminar. She is one of the most thoughtful, intelligent, and hard-working students I have ever taught, and I cannot recommend her highly enough.

Housing Law and Policy is a 20-student elective seminar offered to students in their second and third years at Georgetown Law. Participation in the seminar is on a volunteer-only basis, and students are evaluated primarily based on a final research paper, along with the quality and quantity of their class participation.

Ms. McCallister excelled in every aspect of her work in the seminar. Her final paper, which she chose to write on the issue of homelessness among youth who "age-out" of the foster care system, was among the top two best papers in the class. First and foremost, the quality of her writing is excellent. She writes clearly, persuasively, and with careful attention to detail and word choice. Her research on the topic was also extremely thorough. She used a variety of sources and dug deep into the legal questions at issue. She was also the only student in the class who – on her own initiative – conducted original research by interviewing stakeholders and policymakers. In her final paper she addressed counterarguments, proposed creative reforms grounded in her research findings, and weaved together historical, legal, and political perspectives. Ms. McCallister's outstanding work earned her an "A" grade for the paper and class.

Ms. McCallister's approach to writing the paper also demonstrates her excellent work ethic. Beginning early in the semester, she came to office hours to discuss possible topics and think through ways to narrow her focus once she settled on the topic of youth homelessness. As far as I am aware, she started her research earlier than anyone in the class. She then continued to meet with me regularly to seek out guidance on research strategies, ensure she was taking the paper in the right direction, and talk through her ideas for policy reforms. Throughout our multiple conversations, I witnessed not only her highly disciplined nature, but also her ability to immerse herself in research and her deep intellectual curiosity.

I offer students the option of submitting a first draft for feedback prior to submitting the final draft of their paper. Ms. McCallister was one of only two students who took advantage of this option, again demonstrating her extraordinary discipline and excellent work ethic. She was very receptive to the feedback I provided and incorporated it meticulously. She also met with me again in office hours to ensure that she understood my comments. This experience highlighted for me many qualities of Ms. McCallister that would make her an excellent law clerk: she works ahead of schedule, seeks out feedback, and incorporates it well. I was so impressed with Ms. McCallister's research and writing skills as well as her work ethic that I offered her the opportunity to work as my research assistant after the semester ended. Unsurprisingly (but disappointing to me), she had already been hired by another professor who was similarly impressed by her work.

Ms. McCallister also came to every class extremely well-prepared. On dimensions of both quality and quantity, her participation was at the very top of the class. Her comments were thoughtful, nuanced, and reflected careful reading of the assigned material. She also often connected themes across multiple discrete course topics and classes, demonstrating deep understanding of the material. She was the student whose hand I was always delighted to see raised – she posed insightful questions that pulled the class conversation in novel and exciting directions.

Finally, Ms. McCallister was a true pleasure to have as a student. She is warm, upbeat, and bursting with intellectual energy. She is reflective and continually sought out feedback to improve her work. I have no doubt that she will be a positive presence in chambers and will approach the role with enthusiasm, energy, and a high degree of professionalism.

I recommend Ms. McCallister with the absolute highest level of support and without any reservation. As a former law clerk myself, I think Ms. McCallister displays all the qualities necessary to excel in the role – she is extremely bright, hard-working, and meticulous. If you have any questions or would like to discuss Ms. McCallister's candidacy further, please do not hesitate to contact me at ns1368@georgetown.edu or (847) 644-5808.

Sincerely,

Nicole Summers  
Associate Professor of Law

Nicole Summers - nicole.summers@georgetown.edu

**MARGARET A. MCCALLISTER**

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The attached writing sample is the case comment I drafted for Georgetown's *Write-On Competition*. For the 2022 *Write-On Competition*, competitors were limited to only select provided materials while writing the case comment. The 2022 competition provided competitors with 216 pages of cases, statutes, and commentary for analysis. Competitors were allotted two weeks to independently complete both the case comment and Bluebooking exam for consideration for admission to a Journal. I am proud to share that the combination of this case comment, my Bluebooking exam, and my personal statements secured me a position on the *Georgetown Law Journal*.

The case comment was limited to 7 pages of text and 3 pages of endnotes. This 10-page writing sample includes the facts of the case, the case holding, a roadmap explaining the structure of the comment, analysis, and a conclusion; nothing was redacted for the purposes of this writing sample.

**Strained Reasoning: Why the Tenth Circuit was Wrong  
to Account for Subjective Intent in *Strain v. Regalado***

**I. Introduction**

**A. Statement of Facts**

Thomas Pratt was booked into Tulsa County Jail to await trial on December 11, 2015.<sup>1</sup> The following morning, Pratt informed prison officials that he was experiencing alcohol withdrawal symptoms and requested medication for his detoxification.<sup>2</sup> A nurse from Armor Correctional Health Services performed a drug and alcohol withdrawal assessment during which Pratt stated that he “habitually drank fifteen-to-twenty beers per day for the past decade.”<sup>3</sup> Pratt was admitted to the jail’s medical unit for a mental health assessment and monitoring.<sup>4</sup>

While under observation on December 13, Pratt was placed “on seizure precautions, which dictated that staff check his vital signs every eight hours” and was prescribed Librium for his symptoms.<sup>5</sup> During an early morning withdrawal assessment on December 14, Nurse Patricia Deane observed deteriorating symptoms in Pratt, including vomiting, panic attacks, disorientation, and severe tremors, but did not take Pratt’s vital signs as was mandated by the seizure precautions.<sup>6</sup> After Deane, another nurse attempted to take Pratt’s vital signs, but “could not do so because he would not sit still.”<sup>7</sup> Pratt was later switched from the Librium prescription to a Valium prescription, the first dose of which he took later that day.<sup>8</sup>

Later that morning, Dr. Curtis McElroy examined Pratt, during which he noticed a pool of blood in Pratt’s cell and observed that Pratt was disoriented and had a gash on his forehead.<sup>9</sup> Later that day, a third nurse noted that Pratt “needed assistance with daily living activities.”<sup>10</sup> On December 15, Kathy Loehr evaluated Pratt’s mental health in her capacity as a licensed professional counselor (LPC) and noted both the “unintentional” cut on his forehead and that Pratt was shaky and struggled to answer her questions.<sup>11</sup> That afternoon when Dr. McElroy returned to assess Pratt

a second time, Dr. McElroy found Pratt “underneath the sink in his cell” and again noted the cut on Pratt’s forehead.<sup>12</sup>

Around midnight on December 16, an additional Armor nurse saw Pratt, but failed to check his vital signs because “he would not get up.”<sup>13</sup> An hour later, an officer called for aid upon finding Pratt “motionless on his bed.”<sup>14</sup> The responding nurse initiated cardiopulmonary resuscitation (CPR) and “called a medical emergency.”<sup>15</sup> First responders resuscitated Pratt and rushed him to the hospital.<sup>16</sup> Hospital officials determined that Pratt had gone into cardiac arrest and discharged him with “a seizure disorder and other ailments” leaving him permanently disabled.<sup>17</sup> Pratt’s guardian, Faye Strain, filed suit under 42 U.S.C. § 1983 and Oklahoma state law against defendants Nurse Deane, Dr. McElroy, LPC Loehr, and Tulsa County Sheriff Regalado, alleging the defendants were deliberately indifferent to Pratt’s serious medical needs.<sup>18</sup> The district court dismissed Strain’s federal law claims and declined to exercise supplemental jurisdiction over Strain’s state law claims, which Strain appealed.<sup>19</sup>

## **B. Holding**

The Tenth Circuit Court of Appeals affirmed the district court’s ruling that the defendants did not act with deliberate indifference in their medical treatment of Pratt.<sup>20</sup> Writing for the court, Judge Carson held that a pretrial detainee’s claim for deliberate indifference is governed by both an objective and subjective standard.<sup>21</sup> The court acknowledged and dismissed the Supreme Court’s holding in *Kingsley v. Hendrickson*, construing the language of *Kingsley* to apply only to acts of excessive force and not to claims of deliberate indifference to serious medical needs.<sup>22</sup> While the parties conceded that Pratt exhibited an objectively serious medical need,<sup>23</sup> the court held that Strain’s allegations of deliberate indifference to a serious medical need were unsupported by sufficient facts.<sup>24</sup>

### C. Roadmap

The Tenth Circuit was correct in deciding that the defendants were not deliberately indifferent to Pratt's serious medical needs; however, the court erred in holding that a subjective prong is necessary to the test for deliberate indifference. This comment argues that the Supreme Court provided clear signals that the standard for pretrial detainees' Fourteenth Amendment claims is distinct from that for inmates' Eighth Amendment claims. This comment also argues that the Tenth Circuit ignored its own precedent and Supreme Court precedent in error when applying a subjective prong for deliberate indifference. Lastly, this comment argues that it was unnecessary to consider the subjective component at all because the defendants' actions were not deliberately indifferent even under the lower bar of an objective standard.

## II. Analysis

### A. *Farmer v. Brennan* implicitly distinguished between Eighth Amendment claims by inmates and Fourteenth Amendment claims by pretrial detainees.

Inmates may sue prison officials for cruel and unusual punishment under the Eighth Amendment, but pretrial detainees look to the Fourteenth Amendment's Due Process Clause for relief.<sup>25</sup> The Court's language in *Farmer v. Brennan* carefully defined "deliberate indifference" as "requiring a showing that the official was subjectively aware of the risk," and deemed this standard to "comport[] best with the text of the [Eighth] Amendment as [the Court's] cases have interpreted it."<sup>26</sup> This subjective prong has been interpreted as a "*mens rea* prong."<sup>27</sup> To satisfy the subjective component, a plaintiff must produce evidence that the defendant "actually (subjectively) kn[ew] that an inmate [faced] a substantial risk of serious harm."<sup>28</sup>

Because the due process rights of a pretrial detainee are "at least as great as the Eighth Amendment protections available to a convicted prisoner,"<sup>29</sup> after *Farmer*, lower courts indiscriminately applied a subjective deliberate indifference test to both inmates and pretrial detainees in assessing their § 1983 claims against prison officials.<sup>30</sup> The Seventh Circuit called the

distinction between prisoners' claims and pretrial detainees' claims "immaterial since the legal standard for a § 1983 claim is the same."<sup>31</sup> The Eleventh Circuit similarly noted that "the distinction is unimportant... because this Court has said that 'the minimum standard for providing medical care to a pre-trial detainee under the Fourteenth Amendment is the same as the minimum standard required by the Eighth Amendment for a convicted prisoner.'"<sup>32</sup> However, in *Farmer*, Justice Blackmun in concurrence identified the "source of the intent requirement" as "the Eighth Amendment itself."<sup>33</sup> Moreover, Justice Souter's majority opinion in *Farmer* stated that § 1983 claims "merely provide[] a cause of action, 'contain[ing] no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right.'"<sup>34</sup> The Court took great care to discuss the subjective prong of the deliberate indifference test only as applied to Eighth Amendment claims. The lower courts' application of the subjective prong to pretrial detainee Fourteenth Amendment claims went beyond the mandate of *Farmer* and failed to acknowledge the fundamental differences between the causes of action, which the Court addressed in *Kingsley v. Hendrickson*.<sup>35</sup>

**B. The Tenth Circuit's treatment of *Kingsley* contravenes its own precedent and should be resolved in favor of an objective test.**

In *Kingsley*, the Court explained, "[t]he language of the two Clauses differs, and the nature of the claims often differs. And, most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished at all, much less 'maliciously and sadistically.'"<sup>36</sup> Though the *Kingsley* Court declined to decide the question of what standard should govern the mistreatment of pretrial detainees,<sup>37</sup> this statement evidences that there is not a unilateral subjective standard for due process claims by pretrial detainees.<sup>38</sup> Circuits are split on the question of whether to apply an objective or subjective standard. The Second, Seventh, and Ninth Circuits favor an objective test for deliberate indifference.<sup>39</sup> While the Fifth, Eighth, and Eleventh Circuits join the Tenth Circuit in requiring subjective intent as part of the deliberate indifference calculus, each of those circuits relegates their discussion of *Kingsley* to a footnote; they each acknowledge that *Kingsley* may apply, but cabin their

holdings to excessive force claims.<sup>40</sup> *Strain* is the first case interpreting *Kingsley* in which the majority affords *Kingsley* a discussion in the text of the opinion and yet holds that a subjective prong is essential to the test for deliberate indifference.

However, in the *Strain* opinion, the Tenth Circuit relies on its precedent that either predates *Kingsley* or declined to address the case altogether.<sup>41</sup> Though the Tenth Circuit had previously applied *Kingsley* in *Colbruno v. Kessler* “against law enforcement officers who *punished* a pretrial detainee,”<sup>42</sup> the court’s opinion in *Strain* attempts to distinguish *Colbruno* by differentiating punishment and inadequate medical care.<sup>43</sup> But, the Tenth Circuit concedes that “punishment is a condition of confinement,”<sup>44</sup> and, in *Wilson v. Seiter*, the Supreme Court stated that there was “no significant distinction between claims alleging inadequate medical care and those alleging inadequate ‘conditions of confinement.’”<sup>45</sup> The Tenth Circuit’s distinction is thus illusory. If both punishment and medical care are conditions of confinement, the same standard should be applied to claims alleging a due process violation of either. If the standard for punishment is objective in the Tenth Circuit, so too should the standard for deliberate indifference be objective.

**C. The Tenth Circuit’s treatment of *Kingsley* is also inconsistent with Supreme Court precedent, which favors an objective standard for pretrial detainees.**

The inclusive language of *Kingsley* should be read as applying to all claims by pretrial detainees, not just claims of excessive force. The Tenth Circuit argues that the Supreme Court “has never suggested that we should remove the subjective component for claims addressing inaction.”<sup>46</sup> Yet, the *Kingsley* Court held generally with regard to “the challenged governmental action” and not specifically to excessive force.<sup>47</sup> While the Tenth Circuit argues that *stare decisis* precludes using a purely objective standard for deliberate indifference, citing *R.A.V. v. City of St. Paul* and *Agostini v. Felton*, these cases stand only for the proposition that the court may not contravene Supreme Court decisions, and not that the Tenth Circuit is prohibited from interpreting a decision as applicable to cases the Supreme Court has not squarely addressed.<sup>48</sup>

The Tenth Circuit's opinion heavily relies on *Farmer* but ignores the contours of its holding. In *Farmer*, Justice Souter explained that the Court's prior decision in *Wilson v. Seiter* cited cases that applied an objective standard to deliberate indifference claims "for the proposition that the deliberate indifference standard applies to all prison-conditions claims, not to undo its holding that the Eighth Amendment has a 'subjective component.'"<sup>49</sup> Further, in *Bell v. Wolfish*, the Court applied an "objective standard to evaluate a variety of prison conditions" and "did not consider the prison officials' subjective beliefs."<sup>50</sup> Respecting the mandate of *stare decisis* requires that circuit courts follow the precedents of *Wilson* and *Bell* and an objective standard be applied to evaluate prison conditions, including medical care.

Further, to advance its argument of requiring subjective intent in assessing deliberate indifference, the court uses siloed dictionary definitions to attribute meaning to the words "deliberate" and "indifference."<sup>51</sup> In doing so, it disregarded the Supreme Court's clear statement that the "decision that Eighth Amendment liability requires consciousness of a risk is thus based on the Constitution and our cases, not merely on a parsing of the phrase 'deliberate indifference.'"<sup>52</sup> The Tenth Circuit's attempts to attribute specific meaning to words the Court has held are ambiguous contravenes the very precedent the Tenth Circuit relies on.<sup>53</sup>

**D. It was unnecessary to consider the defendants' subjective intent because, while possibly negligent, the defendants were not deliberately indifferent to Pratt's serious medical need under the lower threshold of an objective standard.**

Even under an objective standard, the defendants cannot be held deliberately indifferent to Pratt's medical needs. Whether the defendants were deliberately indifferent depends on whether they acted in an objectively reasonable manner.<sup>54</sup> Deliberate indifference is found "between the poles of negligence at one end and purpose or knowledge at the other,"<sup>55</sup> but "mere negligence" does not give rise to a claim of deliberate indifference.<sup>56</sup> As in *Swain v. Junior*, both parties acknowledged a serious medical need existed, but disagreed on "the adequacy of the jail's response,"

which is “where the substance of the court’s decision ultimately lies.”<sup>57</sup> Here, the substance of the court’s decision in *Strain* can be determined without reaching a subjective test.

While the staff at Tulsa County Jail may have provided ineffective treatment to Pratt and underestimated the nature of his medical needs, they did provide him with medical care.<sup>58</sup> Upon discovering Pratt in medical distress, he was *rushed* to the hospital.<sup>59</sup> There was no undue delay in his care once the extent of his condition was realized. According to the Eleventh Circuit, which continues to apply a subjective standard post-*Kingsley*, while a “failure to diagnose can be deemed extremely negligent, it does not cross the line to deliberate indifference.”<sup>60</sup> Moreover, the Seventh Circuit, which follows the objective test post-*Kingsley*, has held that a prison official was not deliberately indifferent in “failing to monitor a detainee’s vitals for signs of *delirium tremens*.”<sup>61</sup> Even the Tenth Circuit itself has held that the “negligent failure to provide adequate medical care, even one constituting medical malpractice, does not give rise to a constitutional violation.”<sup>62</sup> At most, the defendants are guilty of failing to take Pratt’s vitals in violation of protocol and failing to recognize signs of *delirium tremens*.<sup>63</sup> Regardless of whether an objective or subjective standard is applied, these alleged actions are merely negligent and are not deliberately indifferent under an objective or subjective standard.

### III. Conclusion

While the Tenth Circuit correctly found that the defendants in *Strain v. Regalado* were not deliberately indifferent, it was incorrect to apply a subjective intent standard in assessing deliberate indifference to a serious medical need. In the wake of *Kingsley v. Hendrickson*, the appropriate test for deliberate indifference to serious medical needs is objective.

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<sup>1</sup> See *Strain v. Regalado*, 977 F.3d 984, 987 (10th Cir. 2020).

<sup>2</sup> See *id.*

<sup>3</sup> *Id.* at 987.

<sup>4</sup> See *id.*

<sup>5</sup> *Id.* at 987–88.

<sup>6</sup> *Id.* at 988.

<sup>7</sup> See *id.* at 997 n.3.

<sup>8</sup> See *id.* at 988.

<sup>9</sup> See *id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See *id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See *id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* (“Plaintiff alleged that Mr. Pratt’s symptoms showed he was suffering from *delirium tremens*.”)

<sup>19</sup> *Id.*

<sup>20</sup> See *id.* at 987.

<sup>21</sup> See *id.* at 989 (citing *Clark v. Colbert*, 895 F.3d 1258, 1267 (10th Cir. 2018)).

<sup>22</sup> See *id.* at 990–91.

<sup>23</sup> See *id.* at 997 n.7.

<sup>24</sup> See *id.* at 997.

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<sup>25</sup> See *Castro v. Cnty. of L.A.*, 833 F.3d 1060, 1067–68 (9th Cir. 2016) (citing *Bell v. Wolfish*, 441 U.S. 520, 535 (1979)); see also U.S. CONST. art. XIV, § 1, cl. 2.

<sup>26</sup> See *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

<sup>27</sup> *Darnell v. Pineiro*, 849 F.3d 17, 29 (2017).

<sup>28</sup> *Caldwell v. Warden, FCI Talladega*, 748 F.3d 1090, 1099 (2014) (citing *Rodriguez v. Sec’y for Dep’t of Corr.*, 508 F.3d 611, 617 (11th Cir. 2007)).

<sup>29</sup> See 833 F.3d at 1067 (citing *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983)).

<sup>30</sup> See *id.* at 1068.

<sup>31</sup> See *Whiting v. Marathon Cnty. Sheriff’s Dep’t*, 382 F.3d 700, 703 (7th Cir. 2004).

<sup>32</sup> See *Burnette v. Taylor*, 533 F.3d 1325, 1333 n.4 (11th Cir. 2008) (citing *Lancaster v. Monroe Cnty.*, 116 F.3d 1419, 1425 n.6 (11th Cir.1997)).

<sup>33</sup> See *Farmer v. Brennan*, 511 U.S. 825, 854 (1994) (citing *Wilson v. Seiter*, 501 U.S. 294, 300 (1991)).

<sup>34</sup> See *id.* (quoting *Daniels v. Williams*, 474 U.S. 327, 330 (1986)).

<sup>35</sup> See *Kingsley v. Hendrickson*, 576 U.S. 389 (2015).

<sup>36</sup> See *id.* at 400–401 (citing *Ingraham v. Wright*, 430 U.S. 651, 671–672 & n.40 (1977)).

<sup>37</sup> *Id.* at 396.

<sup>38</sup> See *Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 424 (5th Cir. 2017) (Graves, J. concurring).

<sup>39</sup> See *Darnell v. Pineiro*, 849 F.3d 17 (2d Cir. 2017); *Miranda v. Ctny. of Lake*, 900 F.3d 335 (7th Cir. 2018); *Castro v. Ctny. of L.A.*, 833 F.3d 1060 (9th Cir. 2016).

<sup>40</sup> See *Alderson*, 848 F.3d at 419 n.4; *Whitney v. City of St. Louis, Mo.*, 887 F.3d 857, 860 n.4 (8th Cir. 2018); *Dang ex rel. Dang v. Sheriff, Seminole Ctny.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017); *Davies v. Israel*, 342 F.Supp.3d 1302, 1310 n.5 (S.D. Fla. 2018).

<sup>41</sup> See *Strain v. Regalado*, 977 F.3d 984, 990–91 (10th Cir. 2020) (citing *Clark v. Colbert*, 895 F.3d 1258, 1269 (10th Cir. 2018)).

<sup>42</sup> See *id.* at 997 n.6 (citing *Colbruno v. Kessler*, 928 F.3d 1155, 1163 (10th Cir. 2019)).

<sup>43</sup> See *id.*

<sup>44</sup> See *id.*

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<sup>45</sup> See *Gordon v. Cnty. of Orange*, 888 F.3d 1118, 1124 (9th Cir. 2018) (citing *Wilson v. Seiter*, 501 U.S. 294, 303 (1991)).

<sup>46</sup> See *Strain*, 977 F.3d at 992 (citing *Castro v. Cnty. of L.A.*, 833 F.3d 1060, 1086 (9th Cir. 2016) (Ikuta, J., dissenting)).

<sup>47</sup> *Castro*, 833 F.3d at 1070 (quoting *Kingsley v. Hendrickson*, 576 U.S. 389, 938 (2015)).

<sup>48</sup> See *Strain*, 977 F.3d at 993 (first citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997); then citing *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 386 n.5 (1992)).

<sup>49</sup> See *Farmer v. Brennan*, 511 U.S. 825, 839 (1994) (citing *Wilson*, 501 U.S. at 298) (emphasis added).

<sup>50</sup> See *Kingsley v. Hendrickson*, 576 U.S. 389, 398 (2015) (citing *Bell v. Wolfish*, 441 U.S. 520, 541–543 (1979)).

<sup>51</sup> See *Strain*, 977 F.3d at 992.

<sup>52</sup> See *Kingsley*, 576 U.S. at 826.

<sup>53</sup> See *id.* at 840.

<sup>54</sup> See *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015) (“[O]bjective reasonableness turns on the ‘facts and circumstances of each particular case.’” (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989))).

<sup>55</sup> *Strain v. Regalado*, 977 F.3d 984, 992–93 (10th Cir. 2020) (citing *Farmer*, 511 U.S. at 835).

<sup>56</sup> *Farmer*, 511 U.S. at 835 (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)).

<sup>57</sup> See Recent Case, *Swain v. Junior*, 961 F.3d 1276 (11th Cir. 2020), 134 HARV. L. REV. 2622, 2624–25 (2021).

<sup>58</sup> *Strain*, 977 F.3d at 987.

<sup>59</sup> *Id.*

<sup>60</sup> See *McElligott v. Foley*, 182 F.3d 1248, 1256–57 (11th Cir. 1999).

<sup>61</sup> See 977 F.3d at 994 (citing *Collins v. Al-Shami*, 851 F.3d 727, 731–32 (7th Cir. 2017)).

<sup>62</sup> *Id.* at 994 (citing *Perkins v. Kan. Dep’t of Corr.*, 165 F.3d 803, 811 (10th Cir. 1999)).

<sup>63</sup> See *Strain*, 977 F.3d at 988.

**Applicant Details**

First Name **James**  
 Last Name **Moes**  
 Citizenship Status **U. S. Citizen**  
 Email Address [jmoes@wisc.edu](mailto:jmoes@wisc.edu)  
 Address

**Address**  
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**Zip**  
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**Country**  
**United States**

Contact Phone Number **2629029666**

**Applicant Education**

BA/BS From **University of Wisconsin-Madison**  
 Date of BA/BS **May 2018**  
 JD/LLB From **University of Wisconsin Law School**  
[http://www.nalplawsonline.org/ndlsdir\\_search\\_results.asp?lscd=35002&yr=2009](http://www.nalplawsonline.org/ndlsdir_search_results.asp?lscd=35002&yr=2009)  
 Date of JD/LLB **May 11, 2024**  
 Class Rank **10%**  
 Law Review/Journal **Yes**  
 Journal(s) **Wisconsin Law Review**  
 Moot Court Experience **Yes**  
 Moot Court Name(s) **Moot Court Board**

**Bar Admission**

### Prior Judicial Experience

Judicial  
Internships/            **No**  
Externships  
Post-graduate  
Judicial Law           **No**  
Clerk

### Specialized Work Experience

### Recommenders

Camie Tahk, Susannah  
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**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

**James Moes**

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June 12, 2023

The Honorable Leslie Abrams Gardner  
U.S. District Court for the Middle District of Georgia  
C.B. King United States Courthouse  
201 West Broad Avenue  
Albany, Georgia 31701

Dear Judge Gardner,

I am a rising third-year law student at the University of Wisconsin Law School, and I am applying for a two-year clerkship in your chambers beginning the 2024 term. I am particularly interested in clerking in your chambers after speaking with your current clerk, Charis Zimmick. It is clear that a district court clerkship will be a fundamental foundation to a future career in litigation, and Charis spoke incredibly highly of Your Honor and clerking in your chambers.

I believe I have the necessary research and writing skills to excel as a clerk in your chambers. This past year I extensively developed these skills as a student participant in the Federal Appeals Project. Alongside my Professor, I experienced the entire lifecycle of a post-conviction direct appeal. I researched and cataloged the docket and trial record, I thoroughly researched all potential issues on appeal, and finally, I drafted substantial portions of the Opening and Reply Briefs. In addition, I recently argued the case in front of the Seventh Circuit Court of Appeals—a highlight of my law school career that provided me with the incredible opportunity to engage in ten-minutes of questioning and dialogue with three sitting judges. A dialogue I hope to continue as a clerk in your chambers. And I will continue to develop my research, writing, and cite-checking skills next year as a judicial intern for the Honorable Justice Karofsky of the Wisconsin Supreme Court and as a Senior Managing Editor of the *Wisconsin Law Review*.

A resume, transcript, and writing sample are enclosed. Letters of recommendation from Associate Dean Tahk, Professor Stephanie Didwania, and Adam Stevenson, the Director of the Frank J. Remington Center, will arrive under separate cover. Additionally, Roberto Tercero, my supervising attorney last summer at the United States Securities and Exchange Commission, is available as a reference. His contact information is:

Roberto Tercero, Senior Counsel  
Division of Enforcement, Securities and Exchange Commission  
Los Angeles Regional Office  
Phone: (323) 965-3891  
Email: [TerceroR@sec.gov](mailto:TerceroR@sec.gov)

Should you require additional information, please do not hesitate to contact me by phone at (262) 902-9666 or by email at [jmoes@wisc.edu](mailto:jmoes@wisc.edu). Thank you for your time and consideration, and I look forward to hearing from you soon.

Sincerely,

/s/  
James Moes  
Enclosures

## James Moes

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### EDUCATION

<b>University of Wisconsin Law School</b>	Madison, WI
<i>Juris Doctor Candidate</i> , GPA 3.68 (Top 7%)	May 2024
Honors: 2022 1L Best Brief Competition, <i>Semi-Finalist</i>	
Journal: <i>Wisconsin Law Review</i> , <i>Senior Managing Editor</i>	
Moot Court: 2023 William E. McGee National Civil Rights Moot Court Competition, <i>Quarter-Finalist</i>	
Activities: Business and Tax Law Association, <i>Vice President</i>	
Pro Bono: Bankruptcy Clinic at Legal Action of Wisconsin, <i>Student Volunteer</i>	
<b>University of Wisconsin–Madison</b>	Madison, WI
<i>Master of Accountancy–Emphasis in Taxation</i> , GPA 3.65	May 2019
<b>University of Wisconsin–Madison</b>	Madison, WI
<i>Bachelor of Business Administration in Accounting</i> , GPA 3.54	May 2018
Study Abroad: Escola Superior de Comerç Internacional, Barcelona, Spain	Spring 2017

### EXPERIENCE

<b>Wisconsin Supreme Court</b>	Madison, WI
<i>Judicial Intern for the Honorable Jill Karofsky</i>	Fall 2023
<b>Arnold &amp; Porter Kaye Scholer LLP</b>	Chicago, IL
<i>Summer Associate</i>	May 2023–July 2023
Draft research memos on matters ranging from Humanitarian Parole applications and immigration law to state healthcare regulations supporting a Motion to Dismiss under the False Claims Act. Track DOJ enforcement of CARES Act fraud. Compile state statutes on telehealth corporations to assist with corporate filings in all fifty states.	
<b>Federal Appeals Project</b>	Madison, WI
<i>Student Clinic</i>	September 2022–May 2023
Briefed case for the Seventh Circuit Court of Appeals. Argued in front of Judges Rovner, Hamilton, and Scudder.	
<b>Project Assistant for Associate Dean Susannah Tahk</b>	Madison, WI
<i>Research Assistant</i>	May 2022–May 2023
Synthesized data from all cases litigated in the United States Tax Court in 2018 and 2020 and compared with tax claims brought in Federal District Court and the Court of Federal Claims for the same years (over 600 cases).	
<b>U.S. Securities and Exchange Commission</b>	Los Angeles, CA
<i>Division of Enforcement–Legal Intern</i>	Summer 2022
Substantiated tips, complaints, and referrals and presented for investigation approval. Investigated violations of the Securities Act of 1933 and Securities Exchange Act of 1934. Drafted subpoenas and declarations.	
<b>EY</b>	Los Angeles, CA
<i>Tax Associate–Financial Services Office</i>	January 2020–August 2021
Analyzed debt and equity transactions for private equity and hedge funds. Determined fund taxable income and reportable items, including foreign interest and disallowed losses from wash sales. Calculated distribution waterfalls to determine managing partner incentives. Reviewed K-1s, federal tax returns, and international filings.	
<b>University of Wisconsin–Madison</b>	Madison, WI
<i>Instructor–AIS 100: Introductory Financial Accounting</i>	September 2018–July 2019

### ADDITIONAL INFORMATION

Enjoy exploring with my dog, Poppy; playing board games; and racing in Mario Kart.  
Passed all sections of the Uniform CPA Exam (BEC, FAR, REG, and AUD).



## Course History Report for James Moes

This document lists the courses, credits, and reported grades for the above-named student of the University of Wisconsin Law School during their current matriculation. This letter is not an official transcript and does not contain information concerning previous course work at the University of Wisconsin-Madison.

### Fall 2021

Course #	Title	Instructor	Credits	Grade
714-003	Civil Procedure I	Mcdermott	4	A-
723-008	Legal Research and Writing	Turner	3	B+
726-002	Intro-Substan Criminal Law	Glinberg	4	A
711-003	Contracts I	Yackee	4	B+
Semester:	Credits: 15	GPA Credits: 15	GPA Points: 53.9	GPA: 3.59
Overall:	Credits: 15	GPA Credits: 15	GPA Points: 53.9	GPA: 3.59

### Spring 2022

Course #	Title	Instructor	Credits	Grade
715-003	Torts I	Mcdermott	4	A-
723-012	Legal Research and Writing	Brown	3	A-
724-003	Property	Ard	4	A-
817-001	Business Organizations I	Atkinson	3	A
Semester:	Credits: 14	GPA Credits: 14	GPA Points: 52.7	GPA: 3.76
Overall:	Credits: 29	GPA Credits: 29	GPA Points: 106.6	GPA: 3.68

### Fall 2022

Course #	Title	Instructor	Credits	Grade
915-003	Federal Criminal Appeals	Stevenson	2	S
815-005	Appellate Advocacy II	Weigold	1	S
899-001	Law Review	Yackee	2	S
854-005	Federal Appeals Project	Stevenson	2	S
742-001	Taxation I	Gondwe	4	A-
731-002	Constitutional Law I	Coleman	3	B+
725-001	Intro to Criminal Procedure	Didwania	3	A
Semester:	Credits: 17	GPA Credits: 10	GPA Points: 36.7	GPA: 3.67
Overall:	Credits: 46	GPA Credits: 39	GPA Points: 143.3	GPA: 3.67

### Spring 2023

Course #	Title	Instructor	Credits	Grade
740-002	Constitutional Law II	Coleman	3	B+
801-001	Evidence	Findley	4	A
815-001	Appellate Advocacy II	Tai; Stevenson	3	S
854-105	Federal Appeals Project	Stevenson	3	S
899-001	Law Review	Yackee	2	S
915-001	Federal Criminal Appeals	Stevenson	2	S
Semester:	Credits: 17	GPA Credits: 7	GPA Points: 25.9	GPA: 3.70
Overall:	Credits: 63	GPA Credits: 46	GPA Points: 169.2	GPA: 3.68

**Fall 2023 - Future Courses**

Course #	Title	Instructor	Credits	Grade
744-001	Administrative Law	Seifter	3	
746-001	Legislation	Desai	3	
771-001	Trusts & Estates I	Erlanger	2	
850-001	Professnl Responsibilities	Raymond	3	
854-018	Judicial Internship	-	4	
950-002	Complex Litigation	Everts; Leffel	3	
Semester:	Credits: 18	GPA Credits: 0	GPA Points: 0	GPA: n/a
Overall:	Credits: 81	GPA Credits: 46	GPA Points: 169.2	GPA: 3.68

Report Generated on 06/12/2023

Official transcripts available from the University of Wisconsin Office of the Registrar.

June 11, 2023

The Honorable Leslie Gardner  
C.B. King United States Courthouse  
201 West Broad Avenue, 3Rd Floor  
Albany, GA 31701-2566

Dear Judge Gardner:

I am writing to recommend James Moes very strongly for a clerkship. I have worked with approximately two dozen research assistants in the course of my career, and James is one of the top three, the others having gone on to what I understand were very successful clerkships. In addition, I have taught hundreds of students, and, while I have not had James in a class, I am confident that he would rank in the very top handful of those as well.

James has worked for me as a research assistant since the summer of 2022. I selected him as the research assistant who would continue on with me through the academic year based on the quality of his work product. James has been a truly outstanding research assistant: hardworking, diligent and careful. The project involved reading and summarizing Tax Court cases. James has shown himself to be an astute reader of the cases, reading them thoroughly without missing relevant propositions or other details. He works efficiently, but never sacrifices care for speed.

I also want to highlight James's outstanding writing abilities. His work is clear, concise, and even fun to read. His summaries demonstrate a deep understanding of the complicated tax issues involved in the cases, and he has a knack for turning that understanding into accessible well-crafted prose.

In addition, I have truly enjoyed working with James. He is responsive, tackles tasks quickly and with a positive attitude. In conversation, he is verbally quick, thoughtful and funny. I am sure he would be a wonderful presence in chambers.

For all of these reasons, I am delighted to give James my highest recommendation for a clerkship. If you have any questions, please do not hesitate to let me know.

Sincerely,

Susannah Tahk

Professor of Law

Associate Dean for Research and Faculty Development

Susannah Camic Tahk - susannah.tahk@wisc.edu - 608-890-3750



Stephanie Holmes Didwania  
Assistant Professor of Law  
[didwania@wisc.edu](mailto:didwania@wisc.edu)  
cell: (630) 854-6319

February 27, 2023

**Re: Judicial Clerkship Letter of Recommendation for James Moes**

Dear Judge,

I am writing to strongly recommend my student, James Moes, who has applied for a judicial clerkship with you. James is a careful thinker, a hardworking student, and a genuinely nice person. I think he will be a fantastic law clerk, and I can't recommend him highly enough.

I have known James since the start of his 2L year, when he was a student in my upper-level course, Introduction to Criminal Procedure. He received one of the top scores in a class of nearly 80 talented students. He frequently contributed to class discussions and asked among the most perceptive questions. The types of questions that James asked in and outside of class showed me that he has the ability to identify doctrinal nuance—an important legal skill that many students hone over the course of law school and that I rarely see in students in their third law school semester. In short, James is one of my very best students.

Beyond our interactions in the classroom, I also got to know James outside of class because he frequently visited my office hours to chat and seek advice. In getting to know James, I learned that he has many skills that make an excellent law clerk. For example, he leads and participates in a wide variety of activities and organizations at the Law School—the *Wisconsin Law Review*, moot court, and others—all of which enrich our community. Last summer he simultaneously completed a legal internship at the SEC while also working as a research assistant for our Associate Dean. And while engaging in scholarship, writing, and service outside of class, James has maintained one of the best grade point averages in his class. I thus believe James would thrive as a law clerk and would perform well in a fast-paced and varied work environment, like clerking.

Beyond his academic prowess, I believe James is also genuinely committed to using his incredible talents to make the world a better place. As a second-year law student, he has already participated in two clinics (the Federal Appeals Project at the Law School and the Bankruptcy Clinic at Legal Action of Wisconsin), which is unusual for any law student, especially one as busy as James.

University of Wisconsin Law School  
University of Wisconsin-Madison 975 Bascom Mall, Madison, Wisconsin 53706  
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James, in sum, is both an outstanding student and a thoughtful person. I think he has very good instincts about the law. I believe he will be an exceptional law clerk and, ultimately, a dedicated attorney and force for good. For these reasons, I highly recommend James for a judicial clerkship. If you would like to discuss his abilities and accomplishments further, please do not hesitate to call me at (630) 854-6319 or email me at [didwania@wisc.edu](mailto:didwania@wisc.edu).

Sincerely,

A handwritten signature in black ink that reads "Stephanie Holmes Didwania". The script is cursive and fluid.

Stephanie Holmes Didwania  
Assistant Professor of Law

June 11, 2023

The Honorable Leslie Gardner  
C.B. King United States Courthouse  
201 West Broad Avenue, 3Rd Floor  
Albany, GA 31701-2566

Dear Judge Gardner:

I write to strongly recommend James Moes for a judicial clerkship during the upcoming clerkship term. I know James through his work in my Federal Appeals Project, a University of Wisconsin Law School clinical program. To put a fine point on my recommendation, James has been one of the best students I have had in the program through my more than ten years of clinical teaching. To put it mildly, James' work in the clinic far exceeded my already-high expectations for my clinic students. He has all the skill and drive to be a tremendous clerk and future attorney.

In his time in my project, he and another student assisted with a direct appeal in the Seventh Circuit. The students took on the role of appellate counsel from the beginning, communicating with the client, reviewing the records, and researching and briefing the issues for appeal. For his part, James was tasked with researching and writing a particularly complicated legal issue, both on the substance and due to some procedural impediments that could have caused difficulty. But James rose to the occasion and even his early drafts were well-researched, persuasively written, and hit the right balance between objectivity and persuasion. It often did not take much substantive editing to get James' drafts where they needed to be for filing. This resulted in excellent opening and reply briefs for the program's client.

Together with his research and writing ability, James is well on his way to being an excellent oral advocate. I had no problem letting James take on what was a difficult oral argument in the Seventh Circuit. James did not just do well; he excelled. His argument style and presentation were at or above the level of many of the appellate practitioners during that day's arguments. My colleague and I who attended agreed that we likely could not have done much better. James had a natural flow with the court's questions, anticipating and answering them and deftly navigating back to the key topics he wanted to address. In the end, fellow law student interns from various schools came up to him to say how inspired they were that a fellow law student could do what he just did. Had it not been the last case of the day, with the courtroom near empty, I suspect many of the other lawyers would have likely done the same.

Along with his substantive legal skill, James also is extremely well organized and diligent in all aspects of his work. Often times, in the clinic setting, a fair amount of poking and prodding is necessary in the early months to get students to move on a given case. From the start, James needed no suggestion or help in this area. When something needed to be done, James completed and did so quickly, often before any sort of informal deadlines we set. It was clear that James was not only diligent and naturally well-organized, but also that he cared about the quality and timeliness of his work. This combination of diligence and organizational skill will fit perfectly with a clerk's duties in managing the various parties in day-to-day court activities.

Beyond his strong ability to work with clients and members the legal community, and his organizational abilities, James has worked to obtain a wide-ranging legal education, all while performing at a level near the top of his class. While excelling academically, with a full course load and Wisconsin Law Review and Wisconsin Moot Court responsibilities, James took a wide variety of courses and excelled. James will continue this rigorous academic work in his third year, while also serving as the Senior Managing Editor for the Wisconsin Law Review. James has a clear aptitude for handling several legal issues at once, a perfect skill for a judicial clerk.

James met and far exceeded my expectations as a student and future attorney. Again, I strongly recommend James for a judicial clerkship during the upcoming clerkship term. If you have any questions about this recommendation, please contact me at (608) 262-9233 or [adam.stevenson@wisc.edu](mailto:adam.stevenson@wisc.edu).

Sincerely,

FRANK J. REMINGTON CENTER

Adam Stevenson

Clinical Professor

Adam Stevenson - [adam.stevenson@wisc.edu](mailto:adam.stevenson@wisc.edu)

**James Moes**

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Re: Writing Sample

The attached writing sample is an appellate brief written for the 2023 William E. McGee National Civil Rights Moot Court Competition. The competition problem focused on two issues: (1) whether a nonconsensual search of petitioner’s home performed by state child-protection workers to investigate alleged child neglect violated the Fourth Amendment, and (2) whether the First Amendment protects the homeowner’s right to video record and livestream the search. I represented the petitioner and home-owner, H.G.

This 13-page writing sample begins with the “Table of Contents” and does not include the “Questions Presented,” “Table of Authorities,” “Opinions Below,” or “Constitutional Provisions and Statutes Involved” found in the original brief.

Finally, the portion of the brief included in this writing sample focuses only the Fourth Amendment issue. While the brief was prepared for a competition with a partner, I have thus omitted all discussion of the First Amendment from the “Statement of the Case,” “Argument,” and “Conclusion” sections of the brief, which my partner in the competition addressed the First Amendment in the brief and in oral argument. Thus, the submitted sample is entirely my own work.

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## STATEMENT OF THE CASE

H.G. is an active member of the McGee community. R.2. She is a strong advocate for social justice and community reform and is engaged in the city's politics. *Id.* She regularly participates in public protests supporting police reform at McGee's city hall and police precinct. *Id.* And, incredibly, H.G. finds the time and energy to advocate for her community despite being a working single-mom focused on supporting her nine-year old son, T.G. *Id.* As a working single-mom, H.G. is sometimes required to bring T.G. with her to community protests (for example, because a babysitter cancelled last minute). *Id.*

Despite her community activism, H.G. has experienced no problems with McGee law enforcement. That is, until McGee's Department of Human Services ("DHS") received a child protective services report alleging that H.G. neglects T.G. *Id.* This report was made via telephone by an anonymous, unidentified source. And the source reported three general allegations of possible child neglect. *Id.*

First, the source alleged that H.G. was not providing adequate food to T.G. *Id.* The source claims to have seen H.G. protesting two times without T.G., for 9–10 hours each time. *Id.* The source alleged H.G. did not have food with her and did not feed T.G., and that on one of the two occasions H.G. expressly denied her child food. *Id.* Second, the source alleged that H.G. uses alcohol and controlled substances. *Id.* The source claims to have seen H.G. at a bar near the mayor's office without her child. *Id.* According to the source, H.G. was drinking heavily and appeared intoxicated. R.3. H.G. was allegedly so intoxicated that it was unclear whether H.G. had also used controlled substances. *Id.* The source also claims to have heard H.G. state that she needed to go home to check that her kid "hasn't gotten up to anything he shouldn't." *Id.* Third, and finally, the source alleged that H.G. and T.G. were homeless. *Id.* The source claims to be concerned only

because the source had seen H.G. and T.G. sleeping outside city hall in sleeping bags on two nights. *Id.*

After receiving the anonymous report, a DHS worker visited H.G.'s address and sought permission to search the home. *Id.* But H.G. denied entry. *Id.* DHS therefore filed a Petition to Compel in McGee District Court. The motion recounted the anonymous source's allegations of neglect. *Id.* In the motion, DHS further asserted that searching H.G.'s home was necessary to investigate the alleged neglect because it was the only available method to corroborate the source's allegations. R.3–4.

The McGee district court held a hearing on the Petition. *Id.* At the hearing, the DHS worker that visited the address listed on H.G.'s license testified to the allegations received in the anonymous report. *Id.* The worker also testified that H.G. refused to allow entry into the apartment and to answer any questions. *Id.* Finally, the worker testified that DHS did not perform any independent investigative work to corroborate the allegations despite confirming that the source's identity was truly unknown to DHS and that DHS had no information to assess the source's credibility. *Id.*

H.G. then testified to dispute the allegations and the worker's testimony. R.5. She testified that she feeds T.G. multiple times a day and that the apartment the DHS worker visited is where she and T.G. regularly sleep. *Id.* H.G. testified that she does sometimes drink alcohol at bars, but that she does not keep alcohol at the apartment and does not use controlled substances. *Id.* H.G. was particularly displeased with DHS's conduct and the judicial process which required her to allow DHS to search her home based on uncorroborated allegations. *Id.*

At the close of the hearing, the district court granted the petition to compel. R.5 The court found probable cause existed to compel H.G. to allow child-protection workers to search the

apartment. *Id.* As summed up by the court, “if you don’t let [DHS] do their job, then I have to force you to.” *Id.* On appeal, the McGee Court of Appeals affirmed the district court’s finding that a lower probable cause standard applies in child-protection cases than in standard criminal cases. R.1. The court also affirmed the finding of probable cause under the lower different standard. *Id.*

### SUMMARY OF THE ARGUMENT

In order to preserve fundamental values of the United States Constitution, this Court should reverse the Court of Appeal’s decision in part by denying the Order to Compel for lack of probable cause. This Court should uphold the Fourth Amendment’s protection against arbitrary government intrusion into the homes of McGee families. And this Court should do so by holding that the standard probable cause requirement from the criminal context applies to child-neglect investigations. Because Respondent did not satisfy the criminal-context’s probable cause requirements of source-reliability and nexus, this Court should overturn the Court of Appeals decision and deny the Order to Compel.

### ARGUMENT

The Fourth Amendment protects the right to be secure against unreasonable searches and seizures. U.S. Const. amend. IV. Its fundamental purpose is to “safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.” *Camara v. Mun. Ct. of City & Cnty. of San Francisco*, 387 U.S. 523, 528 (1967). And the chief evil against which the Fourth Amendment is directed is physical intrusion into one’s home. *Payton v. New York*, 445 U.S. 573, 585 (1980). This Court should reverse the Court of Appeal’s decision in part by denying the Order to Compel for lack of probable cause to search H.G.’s home.

**I. This Court should reverse the Court of Appeal’s decision finding that DHS established probable cause to search H.G.’s home.**

The right of the government to intrude into a home is “a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance.” *Johnson v. United States*, 333 U.S. 10, 14 (1948). The Court of Appeals ignored this concern when affirming the order compelling the search of H.G.’s home. And this Court should reverse the Court of Appeals’ decision for two reasons.

First, the court erred in finding the “probable cause rules developed in criminal cases” are inapplicable to searches performed by child-protection workers. R.10. Rather, the proper standard required by the Constitution is the same standard as developed in criminal cases. And in criminal cases, a court must consider the source’s reliability and the nexus between the allegations and place to be searched when evaluating probable cause. *Illinois v. Gates*, 462 U.S. 213 (1983). McGee’s lower courts thus both erred in applying a constitutionally deficient rule that the criminal-law source-reliability and nexus requirements are inapplicable in the child-protection context. And second, DHS failed to establish probable cause under the proper standard. DHS provided no indicia of the anonymous source’s reliability—including the failure to independently corroborate the source’s allegations. DHS also failed to establish nexus between the alleged neglect and H.G.’s home.

Because the Court of Appeals relied on its own constitutionally deficient standard in finding that DHS established probable cause to search H.G.’s home, Petitioner requests that this Court reverse the Court of Appeal’s decision and deny the Order to Compel.

**A. The same Fourth Amendment analysis is used to determine whether probable cause exists to enter and search a home whether investigating criminal activity or alleged child neglect.**

There is no broad social worker exception to the Fourth Amendment. Its protection against government intrusion applies equally whether the government official is a civil or criminal authority. *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985). And most Federal Circuits have likewise rejected a broad social worker exception. *See, e.g., Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1205 (10th Cir. 2003).

Because the Fourth Amendment’s protection applies equally whether searches are performed by police officers or by children and youth workers, searches in either context must be subject to the full requirements of the Fourth Amendment. Requirements that have been developed in the criminal law context over “a myriad of situations involving very serious threats to individuals and society.” *Good v. Dauphin Cnty. Soc. Servs. for Child. & Youth*, 891 F.2d 1087, 1094 (3d Cir. 1989). This includes the “one governing principle” that courts have consistently followed—searches require probable cause except in “certain carefully delineated classes of cases.” *Camara*, 387 U.S. at 528–29.

As relevant to nonconsensual home searches performed by child protection workers, such as the search of H.G.’s home at-issue here, potential “carefully delineated classes of cases” include<sup>1</sup>: (i) minimally invasive searches, (ii) searches justified by special needs of the government; and (iii) administrative searches. But the search of H.G.’s home is none of these searches: it is not minimally invasive; it is not justified by special needs; and it is not an administrative search. The search must be subject to the traditional probable cause requirement.

<sup>1</sup> Discussion of classes of cases to which the traditional probable cause requirement does not apply but are not potentially relevant, *e.g.*, “searches incident to arrest,” are accordingly omitted from Petitioner’s argument that the search of H.G.’s home in the child-protection context is governed under the traditional probable cause requirement.

**i. Home searches are not minimally invasive.**

The Fourth Amendment affords the greatest protection against home searches. *See, e.g., Florida v. Jardines*, 569 U.S. 1, 6 (2013) (“[W]hen it comes to the Fourth Amendment, the home is first among equals.”); *Silverman v. United States*, 365 U.S. 505, 511, (1961) (“At the [Fourth Amendment’s] core stands the right of a man to retreat into his own home.”). In the child-protection context, a home search also implicates a parent’s interests in the “care [and] custody” of her children. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). And the greatest protection is afforded to the home regardless the context of the search. In fact, because a parent’s right to the custody of her children is a “[liberty] interest far more precious than any property right,” *id.* at 758-59, a home search in the child-neglect context should, if anything, warrant *greater* protection than already afforded a home investigation in criminal cases—not less.

To be clear, the search of H.G.’s home cannot be remotely characterized as minimally intrusive. The search could result in criminal charges for child neglect or for other evidence discovered during the search. It could result in H.G.’s loss of custody of T.G. And the court placed no limitations on the scope of the search. DHS was given complete discretion over the thoroughness of the search and could rummage generally through all of the home’s rooms and the family’s belongings. A home search that is unlimited in scope could result in H.G. losing her fundamental liberty interest in the custody her child is not minimally intrusive. Thus, contrary to the lower courts’ findings, R.10–11, the search cannot be governed by a lower reasonableness standard.

**ii. Home searches investigating child neglect are not justified by special needs.**

When a search serves special needs beyond the normal need for law enforcement, the search may not require probable cause. *Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011). When confronted with such special needs, rather than strictly applying the probable cause requirement,

courts must instead balance the governmental and private interests involved. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

For the special needs exception to apply, a court must first determine that special needs exist beyond the normal need for law enforcement. *Id.* In determining whether such a need exists, the Supreme Court has focused on the purpose of the intrusion. *Nat'l Treas. Emp. Union v. Von Raab*, 489 U.S. 656, 665–66 (1989). That is, the *primary purpose* must be to serve special needs beyond the normal need for law enforcement. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

But because all law enforcement is aimed towards an ultimate societal objective, courts must look at the primary direct and immediate purpose—not simply the ultimate purpose. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001). For example, in *Edmond*, the Court invalidated vehicle checkpoints meant to interdict illegal drugs because the checkpoints aimed to catch drug offenders—a quintessential law-enforcement effort—rather than aiming to address an intermediate safety concern. 531 U.S. 32, 32 (2000); *cf. Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (upholding drunk-driving checkpoints because they were directly aimed at removing immediate roadway safety-threats). Only after finding that a search program's direct and immediate purpose is to further a special need beyond the normal need for law enforcement should a court apply its own balancing test. *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring); *see also Henderson, v. City of Simi Valley*, 305 F.3d 1052, 1057 (9th Cir. 2002).

Petitioner does not wish to make light of the serious nature of child neglect. But the severity of DHS's ultimate purpose is irrelevant. Searches investigating alleged neglect are unlike the checkpoints in *Sitz*, which took drunk drivers off the roadway and immediately reduced the threat of severe injury or death posed to every other driver. 496 U.S. 444. Put differently, searches investigating alleged neglect are no different than searches investigating alleged homicides, which

also serve the ultimate purpose of keeping people safe. Investigating neglect is simply not a special need beyond the normal need for law enforcement. And such searches cannot be exempt from the probable cause requirement.

**iii. Home searches investigating child neglect are not administrative searches.**

The Supreme Court has recognized two classes of “administrative search” cases that are justified by reasonable legislative or administrative standards. *Camara*, 387 U.S. at 538. The first category includes dragnet searches: searches of every person, place, or thing in a specific location or involved in a specific activity. *Verdun v. City of San Diego*, 51 F.4th 1033, 1041 (9th Cir. 2022). The second category includes searches of people belonging to a group as having reduced privacy expectations. *T.L.O.*, 469 U.S. at 340.

The Supreme Court first approved dragnet searches in *Camara*, by holding a routine and periodic safety-related search of every home in a given area was justified as “the only effective way to seek universal compliance” with municipal codes. 387 U.S. at 535–36, 538. Because a regime of individualized suspicion could not effectively serve the government's interest, the distinguishing feature of a dragnet search is its generality. *See, e.g., Nat’l Treasury Emps. Union*, 489 U.S. at 668. Other dragnet searches include stopping every car on a particular roadway, *United States v. Martinez-Fuerte*, 428 U.S. 543, 550 (1976), or random drug-testing programs required of students involved in extracurricular activities. *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 837 (2002).

In the 1980s, the Court expanded the administrative search doctrine to include searches of people belonging to a group as having reduced privacy expectations. *T.L.O.*, 469 U.S. at 340. This category includes four groups of persons: (i) Students, *id.*; (ii) Employees, *O’Connor v. Ortega*, 480 U.S. 709, 725 (1987); (iii) Probationers, *Griffin v. Wisconsin*, 483 U.S. 868, 879 (1987); and (iv) Parolees. *Samson v. California*, 547 U.S. 843, 847 (2006).

Child-neglect investigations, however, are neither dragnet searches nor searches of an individual with reduced privacy expectations. The searches are not dragnet searches because they do not address a public-safety concern, do not search every home in a specific area, and are neither routine nor periodic. DHS wishes to search *only* H.G.'s home based on suspicion *only* of H.G. The search is based entirely on individualized suspicion of neglect.

The searches are also not of persons with reduced privacy expectations. While child-neglect investigations may involve a search of a parent with reduced privacy expectations; this is not always true. And here, H.G. does not belong to a group with reduced privacy expectations. She deserves the full expectation of privacy.

In sum, the search of H.G.'s home must be subject to the traditional probable cause requirement as developed in the criminal context. The search cannot be characterized as minimally invasive. The search is not justified by the special needs of government. And finally, the search is not an administrative search. Because the search does not fall into any of the "carefully delineated classes of cases" that are exempt from the traditional probable cause requirement, both McGee lower courts erred in holding the search was subject to a lower probable cause standard.

**B. DHS failed to establish probable cause to enter and search H.G.'s home under the proper standard.**

The Fourth Amendment requires probable cause to protect against unreasonable searches. U.S. Const. amend. IV. Probable cause is "a fluid concept" to be analyzed under the totality-of-the-circumstances. *Illinois v. Gates*, 462 U.S. 213, 232, 238 (1983). This is a "practical, common-sense" approach that evaluates the reliability of persons supplying information to determine whether a fair probability exists that evidence will be found in a particular place. *Id.*

To justify a search, there must be reason to believe that a crime has been committed. *Id.* But reason to believe a crime has been committed "is not carte blanche to search their home and

all their personal effects.” *United States v. Orozco*, 41 F.4th 403, 409 (4th Cir. 2022). There must also be nexus between the allegations and the home. *Gates*, 462 U.S. at 238 (holding probable cause requires a fair probability evidence will be found *in a particular place*) (emphasis added).

DHS failed to establish probable cause to search of H.G.s’ home for two reasons. First, an unreliable anonymous source does not provide reason to believe H.G. committed the neglect. And second, DHS failed to establish nexus.

**i. DHS failed to establish reason to believe the alleged neglect occurred given the anonymous source’s lack of reliability.**

When analyzing whether to believe an anonymous source’s allegations, the Supreme Court has consistently recognized the value of corroborating details of the informant's tip. *Gates*, 462 U.S. at 241. For example, in *Aguilar v. State of Texas*, the Court noted its finding of lack of probable cause would have been “entirely different” had the police corroborated the informant's report. 378 U.S. 108, 109, n. 1 (1964). In *Jones v. United States*, the Court held an officer can rely on an informant’s information if the statement is reasonably corroborated. 362 U.S. 257, 269 (1960). And in *Florida v. J.L.*, the Court held that an anonymous tip made via telephone by an unknown caller did not justify a “stop and frisk” because the officers' suspicion of a weapon arose solely from the phone call. 529 U.S. 266, 270 (2000).

To be sure, independent corroboration of an anonymous source’ allegations is not a bright-line requirement. For example, in *Alabama v. White*, the Court noted that because only a few people generally know of a person’s future activities, it is reasonable for police to believe that an anonymous person with access to such information is likely to also have provided reliable information about alleged illegal activities. 496 U.S. 325, 332 (1990); *see also Gates*, 462 U.S. at 245 (noting the importance that an anonymous tip contained a range of details relating to “future actions of third parties ordinarily not easily predicted,” not just easily obtained facts and conditions

existing at the time of the tip). But without such additional indicia of reliability, courts have insisted on substantial corroboration. *Helton*, 35 F.4th 511; *Croft v. Westmoreland Cty. Children and Youth Servs* 103 F.3d 1123, 1127 (3d Cir. 1997).

The investigation into H.G. began when DHS received an anonymous phone call alleging neglect. R.2. DHS did not do any independent investigation to corroborate the allegations, other than visiting the address listed on H.G.'s driver's license. R.4. Which, if anything, disproves the allegation of homelessness. This Court should therefore find *J.L.* persuasive: an anonymous telephone call, in which the informant has not placed his credibility at risk and can lie with impunity, provides no basis to judge the credibility of the informant. 529 U.S. at 275. The risk of fabrication, like in *J.L.*, is unacceptable. *Id.*

Nor did the source suggest any knowledge of H.G.'s future activities. Unlike in *Gates* and *White*, the source only alleged easily obtained facts and conditions existing at the time of the tip: H.G. was publicly protesting with her son; R.2; H.G. was drinking in a public bar without her son; R.3; H.G. and her son at times slept outside after protesting. *Id.* The source may simply have been protesting near H.G, or sitting next to her at a bar, and overheard H.G. make the few statements alleged in the petition. R.2–3. But the source's general, public knowledge cannot overcome DHS's failure to corroborate any of the source's allegations. In sum, without more than an uncorroborated, unreliable anonymous source's allegations, DHS has failed to establish reason to believe that H.G. committed the neglect.

**ii. DHS failed to establish nexus between the alleged neglect and H.G.'s home.**

Requiring nexus distinguishes arrest warrants from search warrants and protects against the issuance of general warrants. *United States v. Freeman*, 685 F.2d 942, 949 (5th Cir. 1982); *United States v. Clark*, 638 F.3d 89, 94 (2d Cir. 2011). Warrants the Founders reviled because

Crown officials searched wherever the officials pleased and led to eventual demand for the Fourth Amendment. *Id.*; *Stanford v. State of Tex.*, 379 U.S. 476, 481 (1965).

Multiple Federal Circuits have held that probable cause to search a home requires nexus. For example, in *United States v. Grant*, the Ninth Circuit held that there was no probable cause to search a defendant's home without nexus between a firearm and the defendant's home. 682 F.3d 827 (9th Cir. 2012). In *United States v. Roach*, the Tenth Circuit found probable cause was lacking without nexus between a defendant's alleged gang activity his home. 582 F.3d 1192 (10th Cir. 2009).

To establish nexus, there must be “cause to believe that the specific ‘things’ to be searched for ... are located on the property to which entry is sought.” *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978). Determining whether nexus exists requires drawing on “normal inferences of where one would likely keep” the evidence being sought. *Orozco*, 41 F.4th 403, 409 (4th Cir. 2022); *United States v. Lindsey*, 3 F.4th 32, 39–40 (1st Cir. 2021).

DHS first states in its petition that H.G. twice failed to feed T.G. for ten hours while protesting. R.3–4. This allegation has no connection at all to H.G.'s home. Even assuming a lack of food on the day of the home search, that would not support the allegation that Mother failed to feed T.G. during the protests. There was no allegation that would be supported by a lack of food, such as general signs of malnourishment.

The petition next states that H.G. possibly uses alcohol or controlled substances. *Id.* This allegation also fails to establish a connection to H.G.'s home. While it may be a normal inference that someone drinking at a bar likely keeps alcohol in their home; alcohol is not evidence of neglect. Countless parents safely and responsibly keep alcohol in their home. And the allegation that H.G. was drinking at a bar provides no reason to believe H.G. does otherwise.

Further, even assuming the source's allegation that H.G. used controlled substances is true, *id.*—an assumption that H.G. does not concede and which has not been shown—this allegation still fails to establish nexus. Contrary to drinking at a bar, it is not a normal inference that someone who uses a controlled substance likely keeps the substances at home. Multiple Federal Circuit Courts have held that an informant's knowledge of a person's drug possession does not establish nexus to search his home. *See, e.g., United States v. Higgins*, 557 F.3d 381 (6th Cir. 2009) (holding there was no nexus between an informant's statement that he sold drugs to a defendant and the defendant's home); *United States v. Lalor*, 996 F.2d 1578 (4th Cir. 1993). In sum, the allegation that H.G. used alcohol and controlled substances at a bar, even if true, fails to establish nexus to search H.G.'s home.

Finally, DHS states in its petition that H.G. and T.G. are homeless. R.3-4. Yet a DHS worker visited H.G.'s address and met her at the door. R.4. Any nexus provided by this allegation no longer exists (for example, the need to determine whether the H.G. did in-fact live at the address on her driver's license).

### CONCLUSION

This Court should reverse the Court of Appeal's decision in part by denying the Order to Compel for lack of probable cause to search H.G.'s home. The rule established by the court—that probable cause in the child-neglect context does not require source-reliability or nexus—is constitutionally deficient and should be vacated. Applying the court's rule to this case highlights the rule's inadequacy: Any uncredited, uncorroborated, and unreliable anonymous phone call alleging publicly seen legal behavior couched as neglect would justify a home search. And this Court should protect McGee citizens against such unfounded searches and reverse the decision in part by denying the Order for lack of probable cause as properly required by the Constitution.

## Applicant Details

First Name	Andrew
Last Name	Morales
Citizenship Status	U. S. Citizen
Email Address	<a href="mailto:morales.a24@law.wlu.edu">morales.a24@law.wlu.edu</a>
Address	<div> <div>Address</div> <div> <div>Street</div> <div>309 S Main St Apt #9</div> <div>City</div> <div>Lexington</div> <div>State/Territory</div> <div>Virginia</div> <div>Zip</div> <div>24450</div> </div> </div>
Contact Phone Number	918-625-7069

## Applicant Education

BA/BS From	Westminster College
Date of BA/BS	May 2020
JD/LLB From	Washington and Lee University School of Law
	<a href="http://www.law.wlu.edu">http://www.law.wlu.edu</a>
Date of JD/LLB	May 10, 2024
Class Rank	50%
Does the law school have a Law Review/Journal?	Yes
Law Review/Journal	No
Moot Court Experience	Yes
Moot Court Name(s)	National Environmental Law Moot Court Competition Robert J. Grey, Jr. Negotiations Competition

## Bar Admission

## Prior Judicial Experience

Judicial Internships/Externships **Yes**  
Post-graduate Judicial Law Clerk **No**

### **Specialized Work Experience**

### **Recommenders**

Belmont, Elizabeth  
belmontb@wlu.edu  
Fraley, Jill  
fraleyj@wlu.edu  
Peppers, Todd  
pepperst@wlu.edu

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

Andrew Morales  
309 South Main Street, Apt. 9  
Lexington, VA 24450

June 12, 2023

The Honorable Leslie Abrams Gardner  
Chambers of Judge Leslie Abrams Gardner  
201 West Broad Avenue  
Albany, GA 31701

Dear Judge Gardner,

I am a rising third-year student at Washington and Lee University School of Law. I am writing to apply for a 2024–2026 term clerkship in your chambers.

Enclosed please find my resume, law school and undergraduate transcripts, and writing sample. The writing sample is a brief in support of a motion for summary judgment that I prepared for my Civil Litigation Practicum this past semester. Also enclosed are letters of recommendation from Professors Todd Peppers (540.761.3988), Beth Belmont (540.460.3421), and Jill Fraley (859.321.6242).

If there is any other information that would be helpful to you, please let me know. Thank you for your consideration.

Respectfully,

Andrew Morales

## ANDREW C. MORALES

309 South Main Street Apartment #9 | Lexington, VA 24450 | 918.625.7069 | morales.a24@law.wlu.edu

### EDUCATION

#### **Washington and Lee University School of Law, Lexington, VA**

J.D. Candidate, May 2024

*Academics:* GPA (cumulative): 3.525 (Top 40%); GPA (2L): 3.821; Highest Grade in Evidence

*Activities:* Finalist, Robert J. Grey, Jr. Negotiations Competition  
National Environmental Law Moot Court Competition Team  
Latin American Law Student Association (LALSA)

*3L Externship:* Chambers of U.S. District Judge Robert S. Ballou

*Research:* Assistant to Professor Todd C. Peppers (research on Chief Justice Warren Burger)

#### **Westminster College, Fulton, MO**

B.A., Biochemistry and Philosophy, May 2020

*Honors:* Alpha Chi Honor Society (Initiated as Top 5% of Junior Class)

*Activities:* Undergraduate Scholars Forum, Physiology and Biochemistry Research  
Westminster Seminar Mentor (Selected by Organic Chemistry Professor)  
*WestMo* Tutors (Selected by Professor), Tutor for Statistics and Calculus I  
President of Pre-Healthcare Professionals Association  
Freshman Vice President of Student Government Association  
Student Ambassador

### EXPERIENCE

#### **Huff, Powell & Bailey, LLC, Atlanta, GA**

*Summer Associate*, May – August 2023

#### **Baum, Glass, Jayne, Carwile & Peters, PLLC, Tulsa, OK**

*Summer Associate*, June – August 2022

Worked in trial and appellate practice areas of complex commercial litigation, insurance defense, and energy law. Conducted legal research, wrote memorandums on critical legal questions, and attended depositions.

#### **Secrest, Hill, Butler & Secrest, PC, Tulsa, OK**

*Summer Associate*, May – June 2022

Worked in trial and appellate practice areas of products liability defense, premises liability defense, and medical malpractice defense. Conducted legal research, drafted dispositive motions and support briefs, wrote memorandums on critical legal questions, attended depositions and wrote deposition summaries, conducted opposition research on plaintiffs' expert witnesses for cross-examination, and attended hearings.

#### **Janine Billings State Farm Agency, Tulsa, OK**

*Office Manager, Marketing, Customer Service*, January – July 2021

Executed leadership role in general management during absence of agent. Managed payroll and banking, analyzed and delegated primary client concerns, and revamped marketing strategy via social media.

#### **Lululemon, Tulsa, OK**

*Educator*, August – February 2020

Greeted and appraised guest needs, remedied past product concerns, and educated guests on product details.

### INTERESTS

Running, Weightlifting, Pick-Up Basketball

Philosophy of Mind, Russian Literature, Finding the Best Burger in Town

Print Date: 06/10/2023

Page: 1 of 2

Student: Andrew Christian Morales

WASHINGTON AND LEE  
UNIVERSITY

Lexington, Virginia 24450-2116



SSN: XXX-XX-4703

Entry Date: 08/30/2021

Date of Birth: 04/10/XXXX

Academic Level: Law

**2021-2022 Law Fall**

08/30/2021 - 12/18/2021

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 109	CIVIL PROCEDURE	B+	4.00	4.00	13.32	
LAW 140	CONTRACTS	B+	4.00	4.00	13.32	
LAW 163	LEGAL RESEARCH	B+	0.50	0.50	1.67	
LAW 165	LEGAL WRITING I	B	2.00	2.00	6.00	
LAW 190	TORTS	B	4.00	4.00	12.00	

Term GPA: 3.193

Totals: 14.50 14.50 46.31

Cumulative GPA: 3.193

Totals: 14.50 14.50 46.31

**2021-2022 Law Spring**

01/10/2022 - 04/29/2022

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 130	CONSTITUTIONAL LAW	A-	4.00	4.00	14.68	
LAW 150	CRIMINAL LAW	B-	3.00	3.00	8.01	
LAW 163	LEGAL RESEARCH	B+	0.50	0.50	1.67	
LAW 166	LEGAL WRITING II	B	2.00	2.00	6.00	
LAW 179	PROPERTY	B+	4.00	4.00	13.32	
LAW 195	TRANSNATIONAL LAW	A-	3.00	3.00	11.01	

Term GPA: 3.314

Totals: 16.50 16.50 54.68

Cumulative GPA: 3.257

Totals: 31.00 31.00 100.99

**2022-2023 Law Fall**

08/29/2022 - 12/19/2022

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 642	Law and Geography Seminar	A-	2.00	2.00	7.34	
LAW 685	Evidence	A	3.00	3.00	12.00	
LAW 743	Healthcare Law	A	3.00	3.00	12.00	
LAW 775	Environmental Law	A	3.00	3.00	12.00	
LAW 865	Negotiations and Conflict Resolution Practicum	A-	2.00	2.00	7.34	

Term GPA: 3.898

Totals: 13.00 13.00 50.68

Cumulative GPA: 3.447

Totals: 44.00 44.00 151.67

Print Date: 06/10/2023

Page: 2 of 2

Student: Andrew Christian Morales

WASHINGTON AND LEE  
UNIVERSITY

Lexington, Virginia 24450-2116

**2022-2023 Law Spring**

01/09/2023 - 04/28/2023

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 690	Professional Responsibility	A-	3.00	3.00	11.01	
LAW 716	Business Associations	B+	4.00	4.00	13.32	
LAW 725	Conflict of Laws	A	3.00	3.00	12.00	
LAW 829	Civil Litigation Practicum	A	5.00	5.00	20.00	

Term GPA: 3.755

Totals:

15.00

15.00

56.33

Cumulative GPA: 3.525

Totals:

59.00

59.00

208.00

**2023-2024 Law Fall**

08/28/2023 - 12/18/2023

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 700	Federal Jurisdiction and Procedure		3.00	0.00	0.00	
LAW 707L	Skills Immersion: Litigation		2.00	0.00	0.00	
LAW 713	Sales		3.00	0.00	0.00	
LAW 811	Appellate Advocacy Practicum		4.00	0.00	0.00	
LAW 934	Federal Judicial Externship		2.00	0.00	0.00	
LAW 934FP	Federal Judicial Externship: Field Placement		2.00	0.00	0.00	

Term GPA: 0.000

Totals:

16.00

0.00

0.00

Cumulative GPA: 3.525

Totals:

59.00

59.00

208.00

Law Totals	Credit Att	Credit Earn	Cumulative GPA
Washington & Lee:	59.00	59.00	3.525
External:	0.00	0.00	
Overall:	59.00	59.00	3.525

Program: Law

End of Official Transcript

## WASHINGTON AND LEE UNIVERSITY TRANSCRIPT KEY

Founded in 1749 as Augusta Academy, the University has been named, successively, Liberty Hall (1776), Liberty Hall Academy (1782), Washington Academy (1796), Washington College (1813), and The Washington and Lee University (1871). W&L has enjoyed continual accreditation by or membership in the following since the indicated year: The Commission on Colleges of the Southern Association of Colleges and Schools (1895); the Association of American Law Schools (1920); the American Bar Association Council on Legal Education (1923); the Association to Advance Collegiate Schools of Business (1927); the American Chemical Society (1941); the Accrediting Council for Education in Journalism and Mass Communications (1948), and Teacher Education Accreditation Council (2012).

The **basic unit of credit** for the College, the Williams School of Commerce, Economics and Politics, and the School of Law is equivalent to a semester hour.

The **undergraduate calendar** consists of three terms. From 1970-2009: 12 weeks, 12 weeks, and 6 weeks of instructional time, plus exams, from September to June. From 2009 to present: 12 weeks, 12 weeks, and 4 weeks, September to May.

The **law school calendar** consists of two 14-week semesters beginning in August and ending in May.

**Official transcripts**, printed on blue and white safety paper and bearing the University seal and the University Registrar's signature, are sent directly to individuals, schools or organizations upon the written request of the student or alumnus/a. Those issued directly to the individual involved are stamped "Issued to Student" in red ink. ***In accordance with The Family Educational Rights and Privacy Act of 1974, as amended, the information in this transcript is released on the condition that you permit no third-party access to it without the written consent from the individual whose record it is. If you cannot comply, please return this record.***

### Undergraduate

**Degrees awarded:** Bachelor of Arts in the College (BA); Bachelor of Arts in the Williams School of Commerce, Economics and Politics (BAC); Bachelor of Science (BS); Bachelor of Science with Special Attainments in Commerce (BSC); and Bachelor of Science with Special Attainments in Chemistry (BCH).

Grade	Points	Description
A+	4.00	Superior.
A	4.00	
A-	3.67	
B+	3.33	Good.
B	3.00	
B-	2.67	
C+	2.33	Fair.
C	2.00	
C-	1.67	
D+	1.33	Marginal.
D	1.00	
D-	0.67	
E	0.00	Conditional failure. Assigned when the student's class average is passing and the final examination grade is F. Equivalent to F in all calculations
F	0.00	Unconditional failure.

#### Grades not used in calculations:

I	-	Incomplete. Work of the course not completed or final examination deferred for causes beyond the reasonable control of the student.
P	-	Pass. Completion of course taken Pass/Fail with grade of D- or higher.
S, U	-	Satisfactory/Unsatisfactory.
WIP	-	Work-in-Progress.
W, WP, WF	-	Withdrew, Withdrew Passing, Withdrew Failing. Indicate the student's work up to the time the course was dropped or the student withdrew.

#### Grade prefixes:

R	Indicates an undergraduate course subsequently repeated at W&L (e.g. RC-).
E	Indicates removal of conditional failure (e.g. ED = D). The grade is used in term and cumulative calculations as defined above.

#### Ungraded credit:

Advanced Placement: includes Advanced Placement Program, International Baccalaureate and departmental advanced standing credits.

Transfer Credit: credit taken elsewhere while not a W&L student or during approved study off campus.

#### Cumulative Adjustments:

Partial degree credit: Through 2003, students with two or more entrance units in a language received reduced degree credit when enrolled in elementary sequences of that language.

**Dean's List:** Full-time students with a fall or winter term GPA of at least 3.400 and a cumulative GPA of at least 2.000 and no individual grade below C (2.0). Prior to Fall 1995, the term GPA standard was 3.000.

**Honor Roll:** Full-time students with a fall or winter term GPA of 3.750. Prior to Fall 1995, the term GPA standard was 3.500.

**University Scholars:** This special academic program (1985-2012) consisted of one required special seminar each in the humanities, natural sciences and social sciences; and a thesis. All courses and thesis work contributed fully to degree requirements.

### Law

**Degrees awarded:** Juris Doctor (JD) and Master of Laws (LLM)

Numerical	Letter	Grade*	Grade**	Points	Description
4.0	A			4.00	
	A-			3.67	
3.5				3.50	
	B+			3.33	
3.0	B			3.00	
	B-			2.67	
2.5				2.50	
	C+			2.33	
2.0	C			2.00	
	C-			1.67	
1.5				1.50	This grade eliminated after Class of 1990.
	D+			1.33	
1.0	D			1.00	A grade of D or higher in each required course is necessary for graduation.
	D-			0.67	Receipt of D- or F in a required course mandates repeating the course.
0.5				0.50	This grade eliminated after the Class of 1990.
0.0	F			0.00	Receipt of D- or F in a required course mandates repeating the course.

#### Grades not used in calculations:

-	WIP	-	Work-in-progress. Two-semester course.
I	I	-	Incomplete.
CR	CR	-	Credit-only activity.
P	P	-	Pass. Completion of graded course taken Pass/Not Passing with grade of 2.0 or C or higher. Completion of Pass/Not Passing course or Honors/Pass/Not Passing course with passing grade.
-	H	-	Honors. Top 20% in Honors/Pass/Not Passing courses.
F	-	-	Fail. Given for grade below 2.0 in graded course taken Pass/Fail.
-	NP	-	Not Passing. Given for grade below C in graded course taken Pass/Not Passing. Given for non-passing grade in Pass/Not Passing course or Honors/Pass/Not Passing course.

\* Numerical grades given in all courses until Spring 1997 and given in upperclass courses for the Classes of 1998 and 1999 during the 1997-98 academic year.

\*\* Letter grades given to the Class of 2000 beginning Fall 1997 and for all courses beginning Fall 1998.

#### Cumulative Adjustments:

Law transfer credits - Student's grade-point average is adjusted to reflect prior work at another institution after completing the first year of study at W&L.

**Course Numbering Update:** Effective Fall 2022, the Law course numbering scheme went from 100-400 level to 500-800 level.

Office of the University Registrar  
Washington and Lee University  
Lexington, Virginia 24450-2116  
phone: 540.458.8455  
email: registrar@wlu.edu

  
University Registrar

WASHINGTON AND LEE UNIVERSITY  
SCHOOL OF LAW  
LEXINGTON, VA 24450

June 11, 2023

The Honorable Leslie Gardner  
C.B. King United States Courthouse  
201 West Broad Avenue, 3Rd Floor  
Albany, GA 31701-2566

Dear Judge Gardner:

I am on the faculty at Washington and Lee University School of Law, and am writing to you in very enthusiastic support of Andrew C. Morales, a rising third year law student at W&L who is seeking a clerkship with your court.

Mr. Morales was enrolled in my Fall 2022 Evidence class. In a course that was full of remarkable students, Mr. Morales was the very top performing student on both his final exam and his other required written work (two motions in limine), by a quite significant margin. Moreover, my Evidence class had only 43 students, so over the course of our term together I was able to get to know Mr. Morales rather well. As I explain more fully below, based on my experience with Mr. Morales in class and outside of class, I am confident that he will be an asset to any court that has the pleasure of working with him in its chambers.

I teach my Evidence course with an experiential bent. To that end, in addition to requiring extensive case readings, deep engagement with the rules, and a cumulative multiple-choice final exam, I employ a problem-based approach that demands significant in-class discussion. I also require the students to draft and argue two complex motions in limine involving issues arising under Federal Rules of Evidence 401-404 and 702-703. As a consequence, I am able to develop deeper insights into my Evidence students' strengths and weaknesses than is perhaps typical of a traditional law school classroom.

Over the course of the term, I discovered that, while Mr. Morales has a warm, steady, low-key demeanor, he is absolutely not a wallflower. He was an active and incisive participant in what was a very smart and lively class overall. His in-class work and our out-of-class discussions demonstrated that he is an inquisitive, thorough, creative thinker, and that he is a close reader with very strong analytical skills. Mr. Morales also performed extremely well in his motion in limine oral arguments. He has excellent communication skills, and during his oral arguments he was poised, self-assured, clear and creative. He also did an excellent job engaging with me (as the court) when I pressed him with difficult questions.

Mr. Morales's written work on his two motions in limine was also superb – the strongest in the entire class. Both of his motions made excellent use of the applicable authority, and both were cogent, creative, well-organized, well-argued, and thorough without sacrificing conciseness. Based on my experience with his work, I am confident that Mr. Morales's writing and analytical skills would serve you well in your chambers.

I am also confident that you will find Mr. Morales to be a wonderful colleague. He is truly a delight to be around – he is kind-hearted, collaborative, bright and hard-working. He was a pleasure to teach and work with, and I am confident that he will bring much to your chambers.

I would welcome the opportunity to talk with you regarding Mr. Morales, and I encourage you to contact me with any questions you may have.

Very truly yours,

C. Elizabeth Belmont  
Clinical Professor of Law

Elizabeth Belmont - [belmontb@wlu.edu](mailto:belmontb@wlu.edu)